Supreme Court, U.S.
FILED
(1)
991277 JAN 3 1 2000
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

PHILIP MORRIS INCORPORATED, ET AL.,
PETITIONERS

v.

HOWARD A. ENGLE, M.D., ET AL.,
RESPONDENTS

Petition for a Writ of Certiorari to the Florida District Court of Appeal for the Third District

PETITION FOR A WRIT OF CERTIORARI

ANDREW L. FREY
ANDREW H. SCHAPIRO
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Philip Morris Incorporated

(Additional Counsel Listed On Inside Cover)

47pp

RICHARD A. SCHNEIDER
PAUL D. CLEMENT
King & Spalding
191 Peachtree Street
Atlanta, GA 30303
(404) 572-4600

Counsel for Brown & Williamson Tobacco Corp. (for itself and as successor to The American Tobacco Co.)

ARTHUR J. ENGLAND, JR.
DAVID L. ROSS
Greenberg Traurig
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500

JAMES T. NEWSOM
Shook, Hardy & Bacon
One Kansas City Place
1230 Main Street
Kansas City, MO 64105
(816) 474-6500

Counsel for Lorillard, Inc./ Lorillard Tobacco Co.

ROBERT F. MCDERMOTT, JR.
ROBERT H. KLONOFF
GREGORY G. KATSAS
Jones, Day, Reavis & Pogue
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

WENDY F. LUMISH
Carlton Fields
100 S.E. 2nd Street
Miami, FL 33131
(305) 530-0050

Counsel for R.J. Reynolds Tobacco Co.

JOSEPH P. MOODHE
Debevoise & Plimpton
875 Third Avenue
New York, NY 10022
(212) 909-6000

Counsel for Council for Tobacco Research

JOSE E. MARTINEZ
Martinez & Gutierrez
601 Brickell Key Drive
Miami, FL 33131
(305) 577-4500

Counsel for Tobacco Institute

QUESTION PRESENTED

Whether it is consistent with the requirements of the Due Process Clause for a class action lawsuit to be tried before a judge who is a member of the certified class.

RULE 14.1(b) AND 29.6 STATEMENT

Pursuant to Supreme Court Rule 14.1(b), petitioner states that, in addition to Philip Morris Incorporated, petitioners here, and in the court below, include Lorillard Tobacco Company, Lorillard, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Council for Tobacco Research-U.S.A., Inc., and Tobacco Institute, Inc. In addition to Howard A. Engle, M.D., respondents here, and in the court below, include Robert W. Angell, Raymond Lacey, Frosene Steevens, Frank Amodeo, Mary Farnan, Angie Della Vecchia, Loren Lowery, and Michael Matyi, on behalf of themselves and all others similarly situated; Liggett Group, Inc.; and Brooke Group Ltd., Inc.

Pursuant to Supreme Court Rule 29.6, petitioners submit the following corporate information:

Petitioner Philip Morris Incorporated has the following parent corporation: Philip Morris Companies Inc. Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Petitioner R.J. Reynolds Tobacco Company has the following parent corporation: R.J. Reynolds Tobacco Holdings, Inc. (formerly known as RJR Nabisco, Inc.). R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Petitioner Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company) has the following parent corporations: B.A.T. Industries, p.l.c.; BATIC Inc.; BATUS Holdings Inc. UK/US; BATUS Tobacco Services, Inc.; British American Tobacco p.l.c.; British American Tobacco (1998) Limited; British-American Tobacco (Holdings) Ltd.; and Louisville Securities Ltd. British American Tobacco p.l.c. is the only

publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Petitioner Lorillard Tobacco Company has the following parent corporations: Lorillard, Inc.; and Loews Corporation. Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Petitioner The Council for Tobacco Research-U.S.A., Inc. ("CTR") has no parent corporations. There are no publicly held companies that own 10% or more of CTR's stock.

Petitioner The Tobacco Institute, Inc. ("TI") has no parent corporations. There are no publicly held companies that own 10% or more of TI's stock.

TABLE OF CONTENTS

QUESTION PRESENTED . . . . . (I)

RULE 14.1(b) AND 29.6 STATEMENT ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 8

I. THE DECISION BELOW BLATANTLY VIOLATES THIS COURT'S HOLDINGS THAT DUE PROCESS MANDATES DISQUALIFICATION OF A JUDGE WITH A SUBSTANTIAL FINANCIAL INTEREST IN THE OUTCOME OF THE PROCEEDINGS 9

II. THE DECISION BELOW CONFLICTS WITH SETTLED AUTHORITY FROM STATE SUPREME COURTS AND FEDERAL COURTS OF APPEALS 15

III. THE DECISION BELOW IS PLAINLY WRONG 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Life Ins. Co. v. *Lavoie*, 475 U.S. 813 (1986) 9, 10, 11, 15

Avallone v. *American Tobacco Co.*, No. MID-L-4883-98MT (N.J. Sup. Ct. Dec. 2, 1999) 3

BMW of North America, Inc. v. *Gore*, 517 U.S. 559 (1996) 7

Barnes v. *America Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), cert. denied, 119 S. Ct. 1760 (1999) 3

Barreras Ruiz v. *American Tobacco Co.*, 180 F.R.D. 194 (D.P.R. 1998) 3

Board of Educ. v. *Superior Court*, 448 U.S. 1343 (1980) 2

Bonham's Case, 8 Coke 107a, 77 638 (K.B. 1608) 2

Bracy v. *Gramley*, 520 U.S. 899 (1997) 10, 16

Castano v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) 3

In re Cement Antitrust Litig., 688 F.2d 1297 (9th Cir. 1982), aff'd mem. sub nom *Arizona* v. *United States Dist. Ct.*, 459 U.S. 1191 (1983) 13

Chicago Teachers Union, Local No. 1 v. *Hudson*, 475 U.S. 293 (1986) 9, 10

Christiansen v. *National Sav. & Trust. Co.*, 683 F.2d 520 (D.C. Cir. 1982) 17, 18

Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) 5

TABLE OF AUTHORITIES — Continued

Page(s)

In re City of Houston, 745 F.2d 925 (5th Cir. 1984) . . 17

Connally v. *Georgia*, 429 U.S. 245 (1977) 9, 10, 13

Connecticut v. *Doehr*, 501 U.S. 1 (1991) 18, 21

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 1

Cruz v. *Beto*, 405 U.S. 319 (1972) 23

Duplantier v. *United States*, 606 F.2d 654 (5th Cir. 1979) 17

Eaton v. *City of Tulsa*, 415 U.S. 697 (1974) 23

Emig v. *American Tobacco Co.*, 184 F.R.D. 379 (D. Kan. 1998) 3

Fairfax's Devisee v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) 20

Fisher v. *District Court*, 424 U.S. 382 (1976) 2

Fletcher v. *Brooke Group, Ltd.*, No. CV 97-913 (Ala. Circ. Ct. July 22, 1999) 3

Flower v. *United States*, 407 U.S. 197 (1972) 23

Gibson v. *Berryhill*, 411 U.S. 564 (1973) . . . 9, 10, 12, 15

Honda Motor Co. v. *Oberg*, 512 U.S. 415 (1994) . . 18, 21

Hooks v. *Florida*, 207 So. 2d 459 (Fla. Dist. Ct. App. 1968) 6

Insolia v. *Philip Morris, Inc.*, 186 F.R.D. 535 (W.D. Wis. 1998) 3

Jenkins v. *Florida*, 385 So.2d 1356 (Fla. 1980) 1

TABLE OF AUTHORITIES — Continued

Page(s)

Levine v. *United States*, 362 U.S. 610 (1960) 15

Liljeberg v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) 13, 14

Liteky v. *United States*, 510 U.S. 540 (1994) 19, 20

Livingston & Gilchrist v. *Maryland Ins. Co.*, 11 U.S. (7 Cranch) 506 (1813) 20

Madsen v. *Prudential Fed. Sav. & Loan Ass'n*, 767 P.2d 538 (Utah 1988) 16

Martin v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) 20

Mayberry v. *Pennsylvania*, 400 U.S. 455 (1971) 15

Moses v. *Julian*, 45 N.H. 52 (1863) 20

In re Murchison, 349 U.S. 133 (1955) 9, 10, 14, 15

Nash v. *Florida Indus. Comm'n*, 389 U.S. 235 (1967) 1

New Orleans Pub. Serv., Inc. v. *United Gas Pipe Line Co.*, 719 F.2d 733 (5th Cir. 1983) . . 17

Nordqvist v. *Nordqvist*, 586 So.2d 1282 (Fla. Dist. Ct. App. 1991) 1

Obanion v. *Florida*, 496 So.2d 977 (Fla. Dist. Ct. App. 1986), rev. denied, 504 So.2d 768 (Fla. 1987) 1

Offutt v. *United States*, 348 U.S. 11 (1954) 15

In re Oliver, 333 U.S. 257 (1948) 18, 21

Olson v. *Cory*, 636 P.2d 532 (Cal. 1980) 16, 17

TABLE OF AUTHORITIES — Continued

Page(s)

Palmore v. *Sidoti*, 466 U.S. 429 (1984) 1

Pacific Mut. Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991) 19

Pierce v. *New Mexico*, 910 P.2d 288 (N.M. 1995) . . 16, 17

Pounders v. *Watson*, 521 U.S. 982 (1997) 23

Public Utils. Comm'n v. *Pollak*, 343 U.S. 452 (1952) 15

R.J. Reynolds Tobacco Co. v. *Engle*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) 3

Small v. *Lorillard Tobacco Co.*, 698 N.Y.S.2d 615 (N.Y. 1999) 3

Smith v. *Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997) 3

Taylor v. *American Tobacco Co.*, No. 97-715975 NP (Mich. Circ. Ct. Jan. 10, 2000) 3

Taylor v. *Hayes*, 418 U.S. 488 (1974) 15

Tramonte v. *Chrysler Corp.*, 136 F.3d 1025 (5th Cir. 1998) 17, 18

Tumey v. *Ohio*, 273 U.S. 510 (1927) . . . . . *passim*

United States v. *Realty Co.*, 163 U.S. 427 (1896) 20

United States v. *Will*, 449 U.S. 200 (1980) 17

Vasquez v. *Hillery*, 474 U.S. 254 (1986) 14

Walker v. *Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W. Va. 1997) 3

TABLE OF AUTHORITIES — Continued

Page(s)

Ward v. *Village of Monroeville*, 409 U.S. 57 (1972) . . . . . *passim*

Withrow v. *Larkin*, 421 U.S. 35 (1975) 9, 10

STATUTES & RULES

15 U.S.C. § 1334 5

28 U.S.C. § 144 15

28 U.S.C. § 455 . . . . . 15, 16

28 U.S.C. § 1257 1

Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278 19

SUP. CT. R. 16.1 . . . . . 2, 23

FED. R. CIV. P. 23(b)(3) 21

FLA. CONST. art. V, § 3 1

FLA. CONST. art. V, § 4(b)(3) 1, 2

FLA. R. APP. P. 9.030(a) 1

FLA. R. APP. P. 9.030(b)(3) 2

FLA. R. APP. P. 9.100(a) 2

Fla. Stat. § 38.02 6

Fla. Stat. § 38.04 6

MISCELLANEOUS

ABA CODE OF JUDICIAL CONDUCT Canon 3C . . . 6, 15, 21

TABLE OF AUTHORITIES — Continued

Page(s)

L. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT (1986) 11, 21

Allison, *A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest*, 32 AM. BUS. L.J. 481 (1995) 22

A. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919) 20

CODE OF CONDUCT FOR JUDGES Compendium § 3.1-6[4] 21

CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C 21

E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 212 [141a] (T. Day ed., 1812) 19

Committee on Codes of Conduct, Advisory Opinion No. 90 21

T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (7th ed. 1903) 19

T. COVENTRY, A READABLE EDITION OF COKE UPON LITTLETON § 212 [141a] (1830) 19

FLORIDA CODE OF JUDICIAL CONDUCT Canon 3E(1) 6

Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947) 18, 20

Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1970) 21

TABLE OF AUTHORITIES — Continued

Page(s)

R. HIGHSAW, EDWARD DOUGLASS WHITE: DEFENDER OF THE CONSERVATIVE FAITH (1981) 20

H.R. Rep. 93-1453, *reprinted in* 1974 U.S.C.C.A.N. 6351 16

Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237 (1987) 22

Note, *Disqualification of Judges for Prejudice or Bias — Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311 (1969) 19, 20

Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising From Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987) 19, 20

Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. ASS'N BAR OF CITY OF NEW YORK 694 (Nov. 1973) 22

Shaman & Fouts, *The Impact of Judicial Relationships on the Appearance of Impartiality*, 11 NO. 4 JUD. COND. RPTR. 1 (Winter 1990) 21

R. STERN ET AL., SUPREME COURT PRACTICE (7th ed. 1993) 2

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Florida District Court of Appeal denying the petition for a writ of prohibition (App., *infra*, 1a) is unreported. The decision of the trial court denying petitioners' motion to disqualify (App., *infra*, 2a) is unreported.

JURISDICTION

The Florida District Court of Appeal denied petitioners' petition for a writ of prohibition on August 18, 1999. App., *infra*, 1a. A motion for rehearing and/or certification to the Florida Supreme Court was denied on November 19, 1999. App., *infra*, 2a. Because the District Court of Appeal denied the petition without opinion and did not certify a question to the Florida Supreme Court, the Florida Supreme Court has no jurisdiction to review the denial. See FLA. CONST. art. V, § 3; *Jenkins* v. *Florida*, 385 So.2d 1356, 1359 (Fla. 1980). Accordingly, for purposes of 28 U.S.C. § 1257, the District Court of Appeal is the highest court of Florida in which a decision could be had. See, *e.g.*, *Palmore* v. *Sidoti*, 466 U.S. 429, 430 (1984); *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967); see also FLA. R. APP. P. 9.030(a).

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257. Petitioners have no right under Florida law to litigate the federal issue presented here in any subsequent appeal. See *Nordqvist* v. *Nordqvist*, 586 So.2d 1282, 1283 (Fla. Dist. Ct. App. 1991); *Obanion* v. *Florida*, 496 So.2d 977, 980 (Fla. Dist. Ct. App. 1986), rev. denied, 504 So.2d 768 (Fla. 1987). Thus, this is a case "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975). Moreover, because in Florida a petition for prohibition is an original action (see FLA. CONST. art. V,

§ 4(b)(3); FLA. R. APP. P. 9.030(b)(3), 9.100), the District Court of Appeal's denial of the petition is a final judgment for purposes of this Court's jurisdiction under Section 1257. See *Fisher* v. *District Court*, 424 U.S. 382, 385 n.7 (1976); *Board of Educ.* v. *Superior Court*, 448 U.S. 1343, 1345-1346 (1980) (Rehnquist, J., in chambers); R. STERN ET AL., SUPREME COURT PRACTICE 108 (7th ed. 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." The pertinent provisions of Sections 38.02, 38.04, and 38.10, Florida Statutes, Florida Rule of Judicial Administration 2.160, and Florida Code of Judicial Conduct Canon 3E(1), are set forth at App., *infra*, 5a-9a.

STATEMENT

Petitioners find themselves defending a high-stakes, hard-fought class action lawsuit before a judge who is a member of the certified plaintiff class. Petitioners sought relief in the Florida courts, invoking the firmly established proposition that no person can be a judge in his own case, but the Florida courts rejected that ground for recusal as "legally insufficient." That ruling plainly violates the constitutional guarantee of due process and conflicts with the decisions of this Court, the federal courts of appeals, and the highest courts of numerous states. It also demonstrates that — perhaps even more than "hard cases" — cases that should be easy but that involve unpopular defendants all too often make bad law. Because this is an important case, presenting a fundamental question of constitutional law affecting hundreds of thousands of people, this Court should grant certiorari. Indeed, because the decision below so blatantly conflicts with settled law, the Court may wish to consider summary reversal pursuant to Rule 16.1.

1. This is a class action brought on behalf of "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *R.J. Reynolds Tobacco Co.* v. *Engle*, 672 So. 2d 39, 40 (Fla. Dist. Ct. App. 1996). It is the only smokers' lawsuit ever permitted by any court to go to trial as a class action.[1] Plaintiffs contend that petitioners should be held liable for cancer, heart disease, and other illnesses caused by smoking. Petitioners are vigorously defending against the suit on a variety of grounds. The stakes are immense: the class (which plaintiffs have estimated to include between 225,000 and 850,000 individuals) seeks compensatory and punitive damages in excess of $200 ***billion***.

The trial plan, adopted over petitioners' objections, divided the case into three separate phases. Phase I was designed to adjudicate issues purportedly common to all

---

[1] Federal courts have unanimously rejected requests to certify such class actions by smokers, both on a nationwide and statewide basis, as a violation of Fed. R. Civ. P. 23, the federal Constitution, or both. See, *e.g.*, *Barnes* v. *America Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), cert. denied, 119 S. Ct. 1760 (1999); *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Insolia* v. *Philip Morris, Inc.*, 186 F.R.D. 535 (W.D. Wis. 1998); *Emig* v. *American Tobacco Co.*, 184 F.R.D. 379 (D. Kan. 1998); *Barreras Ruiz* v. *American Tobacco Co.*, 180 F.R.D. 194 (D.P.R. 1998); *Walker* v. *Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W. Va. 1997); *Smith* v. *Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997). Likewise, state courts in all but two other states have rejected attempts to certify smoker class actions. See, *e.g.*, *Taylor* v. *American Tobacco Co.*, No. 97-715975 NP (Mich. Circ. Ct. Jan. 10, 2000); *Avallone* v. *American Tobacco Co.*, No. MID-L-4883-98MT (N.J. Sup. Ct. Dec. 2, 1999); *Small* v. *Lorillard Tobacco Co.*, 698 N.Y.S.2d 615 (N.Y. 1999); *Fletcher* v. *Brooke Group, Ltd.*, No. CV 97-913 (Ala. Circ. Ct. July 22, 1999). Of the two exceptions, the propriety of one class certification (in Louisiana) has been cast into doubt by a subsequently-enacted statute, and the other is currently subject to review on mandamus before Maryland's highest court.

members of the class. One such issue was whether smoking is causally related to various illnesses and medical conditions. The jury found in Phase I that cigarette smoking causes angina and atherosclerosis — the conditions at issue in this petition.[2] Phase II, which is currently underway, is designed (1) to adjudicate the compensatory damages claims of three individual plaintiffs selected by class counsel, and (2) to award a single, "lump-sum" amount of punitive damages that ultimately will be divided evenly among what the judge has described as "the entire qualified class." Phase III, which could take decades to complete, will separately adjudicate the individual liability and compensatory damages claims of the remaining class members.

2. From the outset of this litigation, it was understood that former or present smokers suffering from any of the illnesses at issue in the case (and their family members) could not properly sit in judgment of petitioners.[3] Indeed, during the three-month process of jury selection, the trial judge, the

---

[2] In Phase I, without hearing evidence particular to any class member, the jury also was permitted to find that petitioners engaged in conduct that, in the words of the verdict form, "would permit a potential award or entitlement to punitive damages" in an amount yet to be determined.

[3] Plaintiffs have always steadfastly maintained that the reference to "addiction" in the class definition has no effect on class membership because ***all*** smokers are "addicted" for purposes of this lawsuit. See, ***e.g.***, Engle Class Compilation, at 1-2, *R.J. Reynolds Tobacco Co.* v. ***Engle***, No. 942797 (Fla. Dist. Ct. App. Jan. 30, 1998) ("It was and continues to be the contention of the Engle Class that ***all smokers are addicted*** to cigarettes containing nicotine. That is not an individual issue." (emphasis added)). Moreover, in certifying the case as a class action the trial court expressly cited plaintiffs' contention that all smokers are "addicted." See Order Granting Motion for Class Certification, at 3, *R.J. Reynolds Tobacco Co.* v. ***Engle***, No. 94-08273 CA 22 (Fla. Circ. Ct. Oct. 31, 1994). Plaintiffs do not dispute that, at this juncture in the litigation, the class of plaintiffs includes any smoker or former smoker who is a Florida citizen or resident and suffers from a disease claimed by plaintiffs to be smoking-related.

Honorable Robert P. Kaye, disqualified hundreds of prospective jurors on the ground that they (or, where applicable, their family members) might be part of the plaintiff class. See, *e.g.*, Tr. 3540-3544, 4145-4146, 6050-6052, 7230-7236, 7465-7468, 8103-8107, 9599-9601. Despite relying upon such information to disqualify jurors for cause, Judge Kaye did not divulge that ***he*** had a similar profile, as a former smoker with a form of heart disease alleged by plaintiffs to be caused by smoking.

Following jury selection, and prior to the parties' discovery of his class membership, Judge Kaye presided over Phase I of the case. In those proceedings, the parties presented extensive evidence concerning whether and to what extent smoking is causally related to heart diseases such as angina and atherosclerosis. The trial of Phase I was replete with disputes concerning admissibility of evidence, propriety of lines of questioning, and scope of expert testimony. Judge Kaye adjudicated them all, usually in favor of the class. In addition, in rulings that petitioners contended (and continue to contend) constituted gross misapplications of state and federal law, Judge Kaye held that Florida's statute of repose did not apply because a higher court "might" find its application unconstitutional; that notwithstanding the *Noerr-Pennington* doctrine plaintiffs could introduce extensive evidence concerning defendants' lobbying activities and statements to Congress; and that evidence concerning the alleged inadequacy of post-1969 warnings about the dangers of smoking was admissible despite the preemption provisions of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334, see *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), because, in the judge's words, "pre-emption doesn't apply to modern science and what's happening today." Tr. 16621-16622. Judge Kaye's rulings established the framework for Phase I. At the end of those proceedings, the jury returned findings in favor of the class.

3. Shortly before the end of Phase I, Judge Kaye was suddenly hospitalized. The parties were informed that he had undergone an angioplasty to correct a blocked artery (atherosclerosis) and that, in fact, he had been suffering from a heart blockage for approximately ten years. See Motion to Disqualify, Exh. A, *R.J. Reynolds Tobacco Co.* v. *Engle*, No. 94-08273 CA 22 (Fla. Circ. Ct. Aug. 2, 1999). This was the first time petitioners learned of the trial judge's medical problems. Not long thereafter, petitioners discovered that Judge Kaye was a former smoker, and therefore a member of the plaintiff class. *Ibid.* Judge Kaye had never revealed either his smoking history or his medical condition to the parties, despite clear judicial canons requiring disqualification of a judge with a financial interest in a case and mandating disclosure of information that might relate to such interest. See ABA CODE OF JUDICIAL CONDUCT Canon 3C; FLA. CODE OF JUDICIAL CONDUCT Canon 3E(1).

4. Promptly upon learning of Judge Kaye's membership in the plaintiff class, petitioners moved for his recusal, invoking the relevant provisions of Florida law and the Due Process Clause of the Fourteenth Amendment. Florida law expressly requires a judge who denies a disqualification motion to enter an order declaring himself qualified and to file a sworn statement that the grounds for the motion are untrue. See FLA. STAT. §§ 38.02, 38.04. Judge Kaye did not do so. Instead, a mere two days after the recusal motion was filed, Judge Kaye summarily denied it as "legally insufficient." App., *infra*, 2a. Under Florida law, that denial constituted an acknowledgment that the factual basis for the recusal motion was accurate,[4] leaving only the legal question whether a judge

---

[4] See, *e.g.*, *Hooks* v. *Florida*, 207 So. 2d 459, 464-465 (Fla. Dist. Ct. App. 1968) ("[W]here the judge, upon the suggestion being filed in the language of [Fla. Stat. § 38.02], summarily denies it as having 'no foundation in law,' without even according a hearing to the litigant or his lawyer, he in legal effect concedes the suggestion regardless of how he

may preside over a class action when he is a member of the plaintiff class.

Petitioners then sought a writ of prohibition in the Florida District Court of Appeal for the Third District. They argued that Judge Kaye's membership in the plaintiff class was legally sufficient to mandate his disqualification, under both state law and the federal constitution's guarantee of due process. The petition was denied without comment on August 18, 1999. App., *infra*, 1a. Petitioners' motion for rehearing, rehearing en banc, or certification to the Supreme Court of Florida was denied on November 19, 1999. *Id.* at 3a-4a.

5. Neither the Florida courts nor plaintiffs have disputed that Judge Kaye's history of smoking and heart disease places him within the plaintiff class. Nonetheless, Judge Kaye continues to sit as the trial judge in this ongoing litigation, and to issue what are (and what are bound to be perceived as) crucial rulings in favor of the plaintiff class. For example, for months Judge Kaye had indicated that punitive damages would need to be determined individually. Following his hospitalization, plaintiffs asked Judge Kaye to reconsider that ruling and instead to allow the jury to return a single, potentially massive, lump-sum punitive award, which would be divided evenly among the successful members of the certified class. Petitioners strenuously opposed that suggestion, pointing out, among other things, that a lump-sum award in Phase II, prior to the adjudication of individual compensatory damages in Phase III, would not permit satisfaction of the legal requirement that punitive damages bear a reasonable relationship to actual harm. See, *e.g.*, *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 580-82 (1996). Despite this problem, Judge Kaye granted plaintiffs' motion and changed the trial plan to provide for a lump-sum punitive award.

---

otherwise characterizes it.").

Thus, in Phase II as presently structured, Judge Kaye has (over petitioners' objections) permitted the trial of individual claims, starting with three persons hand-picked by class counsel, and apparently continuing until the jury reaches a verdict that petitioners are liable to at least one plaintiff. The jury will then be directed to determine, in one lump sum, a class-wide award of punitive damages.

REASONS FOR GRANTING THE PETITION

For all involved, the stakes in this landmark case — the first smokers' class action ever permitted to go to trial — are enormous. For the tobacco companies (threatened with potentially ruinous liability), the hundreds of thousands of class members (who stand to share in any damages awards), and the courts of Florida (which under the trial plan would adjudicate Phase III claims for decades), what happens in this trial will have profound ramifications. But perhaps the most serious impact of this closely watched case will be upon the public's perception of the fairness of our judicial system.

It is wholly inconsistent with the most fundamental notions of fairness to have this precedent-setting, multi-billion dollar case tried by a judge who will be eligible to receive a substantial recovery himself if the plaintiffs prevail. In allowing Judge Kaye to preside over the case despite his membership in the certified class, the Florida courts have bent the constitutional constraints imposed by the Due Process Clause beyond recognition.

No proposition is more firmly established than that due process requires a neutral decisionmaker with no financial interest in the outcome of a case. This rule has been interpreted by every court to have addressed the issue — until now — to bar a judge from presiding over a lawsuit to which he is a party and in which he stands to gain a substantial monetary recovery if the action is successful. This Court has long taken a special interest in enforcing that principle, which is essential to public confidence in the judicial system. In cases

such as *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 293 (1986), *Connally* v. *Georgia*, 429 U.S. 245 (1977), *Withrow* v. *Larkin*, 421 U.S. 35 (1975), *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), *In re Murchison*, 349 U.S. 133 (1955), and *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the Court has granted review to make clear, in a broad range of contexts, the fundamental nature of the right to impartial adjudication.

The Court should do so once again here. Whether injured smokers should be permitted to recover damages from tobacco companies, and, if so, under what circumstances and to what extent, are critical issues of public policy. If they are to be decided in the courts, it is essential to adhere to basic rules designed to ensure absolute fairness. Nonetheless, the Florida courts have held that the trial judge's class membership is "legally insufficient" to require his recusal in this class action. Florida law will not permit petitioners to litigate that issue in any subsequent appeal. See page 1, *supra*. To maintain public faith in the legal system, uniformity of decisions, and the interests of justice, this Court should grant review.

I. THE DECISION BELOW BLATANTLY VIOLATES THIS COURT'S HOLDINGS THAT DUE PROCESS MANDATES DISQUALIFICATION OF A JUDGE WITH A SUBSTANTIAL FINANCIAL INTEREST IN THE OUTCOME OF THE PROCEEDINGS

This Court has repeatedly held that due process prohibits trials by judges with financial interests in the cases before them. That principle applies to class actions as it does to individual lawsuits. The decision below squarely conflicts with those holdings.

A "'fair trial in a fair tribunal,' * * * before a judge with no actual bias against the defendant or interest in the outcome of his particular case," is a cornerstone of due process. *Bracy*

v. *Gramley*, 520 U.S. 899, 904-905 (1997) (quoting *Withrow*, 421 U.S. at 46). Accordingly, as this Court has recognized repeatedly over the past seven decades, a judge's pecuniary interest in the outcome of a case disqualifies him under the Due Process Clause. *Aetna*, 475 U.S. at 824; *Hudson*, 475 U.S. at 307-308; *Connally*, 429 U.S. at 250; *Withrow*, 421 U.S. at 47; *Gibson*, 411 U.S. at 579; *Ward*, 409 U.S. at 60-61; *Murchison*, 349 U.S. at 136; *Tumey*, 273 U.S. at 523.

The decision in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), makes clear that the financial interest possessed by Judge Kaye mandates his disqualification under the Due Process Clause. In *Aetna*, this Court reviewed the refusal of a justice of the Alabama Supreme Court to disqualify himself from an appeal involving the questions whether Alabama law permitted an intentional tort claim of bad faith in first-party insurance actions and, if so, whether a successful plaintiff in such a case could be awarded punitive damages. *Id.* at 816, 822. At the time he cast the deciding vote to recognize the claim and authored the opinion for the majority, the challenged justice was a plaintiff in a pending putative class action involving similar legal theories. *Id.* at 822-823. Shortly after issuance of the Alabama Supreme Court's opinion, the justice received a $30,000 settlement. *Id.* at 824.

This Court held in *Aetna* that the justice's participation in the appeal violated due process by making him "'a judge in his own case.'" 475 U.S. at 824 (quoting *Murchison*, 349 U.S. at 136). The justice's opinion for the Alabama Supreme Court "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *Aetna*, 475 U.S. at 824. This financial interest was sufficiently "direct, personal, [and] substantial" to mandate

disqualification. *Ibid.* (citation and internal quotation marks omitted).[5]

Here the trial judge is a plaintiff not in a ***similar*** case, but in ***the very case before him***. The due process violation could not be more egregious. We know from the record that Judge Kaye would not have been permitted to sit as a juror, had his personal situation been revealed; yet he is presiding over this case as a judge. Put another way, every time plaintiffs' counsel makes an argument to Judge Kaye, he is requesting a favorable ruling from one of his clients. A more flagrant conflict of interest could hardly be imagined.

Judge Kaye's financial interest in the case is certainly "direct, personal, [and] substantial." *Aetna,* 475 U.S. at 824 (citation and internal quotation marks omitted). As a former smoker with heart disease, Judge Kaye will be eligible to seek not only compensatory damages for his heart condition but his share of any lump sum punitive damages award that may be returned in Phase II of the case. If the class succeeds in obtaining the full amount it seeks (and every ruling by Judge

---

[5] In contrast, the *Aetna* Court noted, any pecuniary interest the remaining justices of the Alabama Supreme Court might have, by virtue of their status as potential class members in the disqualified justice's pending lawsuit, was too "speculative and contingent" to require recusal. 475 U.S. at 825-826. As the Court explained, the justices were not even aware of the pending action before issuance of their decision; at the time of denial of the motion for rehearing, "the trial court had not even certified a class, let alone awarded any class relief of a pecuniary nature." *Id.* at 826. This Court's emphasis on the lack of a certified class is mirrored in the holdings of lower courts, which have distinguished between judges who are members of a certified class, who are disqualified from hearing the action, and judges who are potential members of classes that have not yet been certified, who are not. See pages 16-18, *infra*. But see L. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT 50 (1986) ("As long as the possibility exists that a class will be certified, a judge who may be a class member should not preside in even the preliminary matters of the case."). Here the class has been certified.

Kaye in plaintiffs' favor increases the likelihood of that outcome), the recovery will be upwards of $200 billion — or more than ***$200,000*** per person even if the class includes 850,000 members and every one prevails on his or her claim. But whatever the precise number, the sum of money that Judge Kaye stands to receive if plaintiffs prevail undeniably "offer[s] a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true." *Tumey*, 273 U.S. at 532.

To be sure, for Judge Kaye as for any other class member, recovery on an individual claim is uncertain. That, however, hardly eliminates the disqualifying interest. Indeed, this Court has made clear that the due process ban on interested decisionmakers applies even in cases where the financial interest in the outcome of litigation is far more attenuated than it is here. In *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), for example, the Court held that license revocation hearings before the state Board of Optometry violated due process, because a decision to revoke licenses of optometrists employed by business corporations would reduce by nearly half the number of optometrists in competition with members of the Board, which was made up solely of optometrists in private practice. *Id.* at 578-579. As the Court explained, this reduction of competition, and the likelihood of personal financial gain that might result, created a sufficient "financial stake" to render the Board members unconstitutionally interested. *Id.* at 579.

And in *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), the Court held that an indirect financial stake, even with no possibility of personal financial gain, mandated disqualification. The challenged judge in *Ward* was the mayor of a village with "executive responsibilities for village finances." *Id.* at 60. Fines, forfeitures, costs, and fees imposed by the mayor for ordinance violations and traffic offenses were paid into the municipal treasury. *Id.* at 58 & n.1. The Court held that this indirect financial interest was

sufficient to create a "'possible temptation'" of "partisan" decisionmaking, in order "to maintain the high level of contribution from the mayor's court." *Id.* at 60 (quoting *Tumey*, 273 U.S. at 532); see also *Connally*, 429 U.S. at 250 (due process violated where magistrate received fee for issuing, but not denying, search warrant, because of possible temptation created by financial interest).

Nor does the fact that Judge Kaye's financial interest stems from his status as a member of a certified class alter the constitutional calculus. The due process guarantee of an impartial decisionmaker applies with full force to class actions, despite the difficulties that sometimes arise in ascertaining whether a judge has a disqualifying financial interest. In *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Court acknowledged that large class actions often have "hundreds or even thousands" of class members. *Id.* at 862 n.9. Furthermore, "the fact that the precise contours of the class are often not defined until well into the litigation" may mean that a judge is not aware of a disqualifying interest until a relatively late stage of the proceedings. *Ibid.* Nonetheless, the Court explained, judges have "a duty to stay informed of any personal or fiduciary financial interest they may have in cases over which they preside" — and to disqualify themselves when such an interest is discovered — in order to satisfy the statutory and constitutional requirements of an impartial tribunal. *Ibid.*; see also *id.* at 865 n.12 (noting "constitutional dimensions" of disqualification for interest).[6]

---

[6] Although a judge's minimal and attenuated interest in some class actions might not be sufficient for disqualification under the Due Process Clause, cf. *In re Cement Antitrust Litig.*, 688 F.2d 1297 (9th Cir. 1982), aff'd mem. sub nom. *Arizona* v. *United States Dist. Ct.*, 459 U.S. 1191 (1983), there can be no doubt that this case involves a direct financial interest of potentially substantial magnitude. Whatever the outer limits of disqualification in the context of a class action, this case is well within them.

Strict enforcement of the disqualification requirement is particularly appropriate in a case like this, where the contours of the likely plaintiff class were known at an early stage of the proceedings. During voir dire, each prospective juror was asked whether he or any family member was a current or former smoker and, if so, whether he or the family member suffered from any of the diseases or medical conditions that plaintiffs alleged to be caused by smoking. Judge Kaye disqualified numerous potential jurors who answered these questions in the affirmative, on the grounds of their actual or potential membership in the class. Judge Kaye knew from the onset of the trial (although the defendants did not) that he was a former smoker. After months of evidence on the links between smoking and various illnesses, he was hospitalized ***as the result of a disease that the plaintiffs' case specifically associates with smoking***. No defendant — let alone a defendant faced with massive and potentially ruinous damages liability — should in fairness be forced to proceed under such circumstances.[7]

"[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment," such as a financial stake as a member of a certified class in the outcome of the class action proceedings, the Court will "presume that the process was impaired" and vacate the judge's rulings. *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (plurality opinion). This Court recognized in *Murchison* that this

> stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."

---

[7] Financial interest aside, the fact that Judge Kaye only recently has had a very personal, life-altering experience that goes to the essence of this very case by itself suggests that impartiality, and its appearance, are impossible.

349 U.S. at 136 (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)); see also, *e.g.*, *Taylor* v. *Hayes*, 418 U.S. 488, 501 (1974); *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971); *Levine* v. *United States*, 362 U.S. 610, 616 (1960); *Public Utils. Comm'n* v. *Pollak*, 343 U.S. 452, 467 (1952) (Frankfurter, J.). That is eminently so here.

Petitioners have been denied the central guarantor of due process: an impartial judge. Because of the fundamental "[i]mportance of the federal constitutional question[]" raised by bias or interest on the part of a decisionmaker (*Murchison*, 349 U.S. at 136), this Court has frequently granted review to safeguard the due process requirement of judicial impartiality. See, *e.g.*, *Aetna*, 475 U.S. 813; *Taylor*, 418 U.S. 488; *Gibson*, 411 U.S. 564; *Ward*, 409 U.S. 57. Given the blatant nature of the due process violation here, and the enormous practical importance of this litigation, review unquestionably is appropriate.

II. THE DECISION BELOW CONFLICTS WITH SETTLED AUTHORITY FROM STATE SUPREME COURTS AND FEDERAL COURTS OF APPEALS

The decision below stands in sharp contrast to the widespread judicial recognition, embodied in rulings of numerous state and federal courts, that a trial judge may not preside over a class action when he is a member of the certified class and has a substantial financial interest in the outcome of litigation.[8]

---

[8] Disqualification standards for federal judges are codified at Sections 144 and 455, 28 U.S.C., and the Code of Conduct for United States Judges; in state court, disqualification is governed by state statutes and judicial and professional rules, including Canon 3C of the ABA Code of Judicial Conduct. Although the decisions discussed in this section were based on state and federal law rather than the Due Process Clause directly, they nonetheless reflect constitutional requirements. See, *e.g.*, H.R. REP. 93-1453, at 7, *reprinted in* 1974 U.S.C.C.A.N. 6351, 6356 (noting that 28 U.S.C. § 455 is intended to codify "the proposition that the judge's direct

State supreme courts have consistently agreed that a judge's pecuniary interest in a case stemming from his status as a class member mandates disqualification. In *Madsen* v. *Prudential Federal Savings & Loan Ass'n*, 767 P.2d 538 (Utah 1988), for example, the plaintiffs sought damages for a class of Prudential borrowers; the trial judge was a former borrower. *Id.* at 539-540. Although the Utah Supreme Court found that the motion to disqualify was untimely, it nonetheless went on to determine whether, in light of "the importance of impartiality," the trial judge should have recused himself *sua sponte*. *Id.* at 544. The court held that potential class membership was not grounds for disqualification, but that the trial judge "would have to disqualify himself from further proceedings" if "any existing certified classes are expanded to include [the trial judge] or any new class were certified that included him." *Id.* at 549.

Similarly, in *Pierce* v. *New Mexico*, 910 P.2d 288 (N.M. 1995), the New Mexico Supreme Court reviewed the dismissal of a class action brought on behalf of retirees receiving a state pension. As the court explained, the "remote pecuniary interest" of its justices arising from their status as state employees participating in the state pension system would normally require disqualification. *Id.* at 293. The California Supreme Court reached the same conclusion in *Olson* v. *Cory*, 636 P.2d 532 (Cal. 1980), assuming that its members' financial interest in a class action brought on behalf of all state judges to challenge limits on judicial salary increases

---

economic or financial interest, even though relatively small, in the outcome of the case may well be inconsistent with due process"). This Court noted in *Bracy* that although "most questions concerning a judge's qualifications to hear a case are * * * answered by common law, statute, or the professional standards of the bench and bar," the Due Process Clause "establishes a constitutional floor" of a judge with no "interest in the outcome" of the case being adjudicated. 520 U.S. at 904-905.

would disqualify them from considering the appeal. *Id.* at 535.[9]

Federal courts of appeals have likewise concluded that a pecuniary interest as a class member disqualifies a judge from presiding over the class action. Thus, the Fifth Circuit has deemed it "fairly obvious that where a judge * * * is a member of a class seeking monetary relief," the judge's "financial interest in the case" would require disqualification. *Tramonte* v. *Chrysler Corp.*, 136 F.3d 1025, 1029 (5th Cir. 1998); see also *In re City of Houston*, 745 F.2d 925, 928 n.6 (5th Cir. 1984) (judge who is class member in action seeking pecuniary relief is disqualified as interested party) (dictum); *New Orleans Pub. Serv., Inc.* v. *United Gas Pipe Line Co.*, 719 F.2d 733, 734-735 (5th Cir. 1983) (judges who are class members in certified class seeking monetary relief are disqualified, but judges are not required to disqualify themselves if a class has yet to be certified); *Duplantier* v. *United States*, 606 F.2d 654, 662 (5th Cir. 1979) (judges who are class members normally are required to disqualify themselves, although participation may be permitted under rule of necessity).

The D.C. Circuit has distinguished between class actions that do not seek monetary recovery for individual class members and class actions seeking individual damages. *Christiansen* v. *National Sav. & Trust. Co.*, 683 F.2d 520, 526 (D.C. Cir. 1982). Although the *Christiansen* court held that class-member judges are not disqualified from presiding over the former type of cases, it suggested strongly that they were disqualified in the latter. *Ibid.*; see also *Tramonte*, 136

---

[9] In *Pierce* and *Olson*, the courts held that the common law rule of necessity — which permits adjudication by interested judges if judicial review would not otherwise be possible, see *United States* v. *Will*, 449 U.S. 200, 211-217 (1980) — permitted the justices to adjudicate the matter despite their financial stake in the cases' outcomes. *Pierce*, 910 P.2d at 293; *Olson*, 636 P.2d at 535. That rule has no application here.

F.3d at 1029 (*Christiansen* "impl[ies] that judges should recuse themselves if they are members of a class for which individual recovery is sought").

III. THE DECISION BELOW IS PLAINLY WRONG

It is hardly surprising that the action of the Florida courts in this case, permitting a trial judge with a pecuniary interest as a class member to be the judge in his own case, conflicts with holdings of this Court and of every other state and federal court to have addressed the issue: it is patently untenable in light of basic constitutional principles.

First, and most important, allowing Judge Kaye to continue to preside cannot be reconciled with traditional notions of fairness. As this Court has emphasized "from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). Where a challenged procedure deviates from "common-law practice" and the "procedures applied by every other state," this Court has not hesitated to invalidate it. *Id.* at 435; see also, *e.g.*, *Connecticut* v. *Doehr*, 501 U.S. 1, 16-17 (1991) (striking down prejudgment attachment procedure "unknown at common law" and at odds with the procedures of "nearly every State"); *In re Oliver*, 333 U.S. 257, 267 (1948) (invalidating contempt conviction imposed on the basis of *in camera* proceedings where public criminal trial was "universal" practice of federal and state courts "during our nation's history" and had "its roots in our English common law heritage"). The rule against pecuniary interest — which has stood unchallenged for more than three centuries — has precisely the type of historical pedigree that establishes it as an essential element of the rule of law.

The English common law set forth a simple rule: because "no man shall be a judge in his own case," a judge was disqualified if he had a "direct pecuniary interest" in the case. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609-610 (1947); see also *Tumey*, 273 U.S. at 524 (collecting

cases). Thus, as Sir Edward Coke explained, a lord could not set the amount of a fine to be paid for damages to his own property, nor could bailiffs levy a fine to be paid to one of them as a party.[10] E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 212 [141a] (T. Day ed., 1812); see also T. COVENTRY, A READABLE EDITION OF COKE UPON LITTLETON § 212 [141a] (1830). This principle was well-established in England by 1608. See Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising From Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 388 & nn. 32-34 (1987) (describing *Bonham's Case*, 8 Coke 107a, 77 638 (K.B. 1608)).

"The maxim that 'no man should be a judge in his own cause' was woven into the fabric of early American jurisprudence." Note, *Disqualification of Judges for Prejudice or Bias — Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311, 322 (1969). As one early constitutional commentator noted, the guarantee of due process mandated disqualification of a judge with an interest in the outcome of the case wherever the suit was "brought or defended in his interest" or "the property of a judge from its situation will be affected like complainant's by his ruling." T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 592 & n.3 (7th ed. 1903). Congress codified this principle in the first federal statute governing judicial disqualification, enacted in 1792, which required recusal by a district judge "concerned in interest" in a case. See Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278; see also *Liteky* v. *United States*, 510 U.S. 540,

---

[10] As Justice Scalia explained in his concurring opinion in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), the "American colonists were intimately familiar with Coke," and understood "due process of the law" to include Coke's understanding of the "the customary procedures to which freemen were entitled by the old law of England." *Id.* at 28-29 (citation and internal quotation marks omitted).

544-548 (1994) (citing successor statutes). By 1863, the New Hampshire Supreme Judicial Court could declare it to be "the immemorial practice of the courts" to treat as disqualified a judge with a financial interest in a case, even if "brought in another's name." *Moses* v. *Julian*, 45 N.H. 52, 53 (1863); see also, *e.g.*, Note, *Disqualification of Judges*, 48 OR. L. REV. at 314, 321-325. That principle has survived to the modern day. See Note, *Safeguarding the Litigant's Constitutional Right*, 86 MICH. L. REV. at 383 n.10, 386 n.25 (collecting statutes, state constitutional provisions, and professional codes requiring disqualification for interest).

In fact, in this very Court it has long been the practice for Justices to recuse themselves in cases in which they had any direct pecuniary interest, including an interest as a class member. Justice Livingston disqualified himself in *Livingston & Gilchrist* v. *Maryland Insurance Co.*, 11 U.S. (7 Cranch) 506, 506 (1813). Chief Justice Marshall disqualified himself in *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 603 (1813), and *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). See IV A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 145-161 (1919). And in *United States* v. *Realty Co.*, 163 U.S. 427 (1896), Justice Edward White did not participate in a case challenging the constitutionality of federal bounties paid to sugar manufacturers and producers, brought on behalf of a class of manufacturers and producers. *Id.* at 444. As a recipient of a sugar bounty, Justice White was a member of the class on whose behalf the suit was brought. See R. HIGHSAW, EDWARD DOUGLASS WHITE: DEFENDER OF THE CONSERVATIVE FAITH 50-51 (1981); Frank, *supra*, 56 YALE L.J. at 615 n.42.

Accordingly, the uniform rule of the common law, the state and federal courts, and this Court is to disqualify a judge with a direct pecuniary interest, including an interest as a class member, in the outcome of litigation. The Florida courts' casual conclusion that Judge Kaye's class membership somehow was "legally insufficient" to require his recusal

cannot be squared with this time-honored rule and the traditional understanding of the strictures of due process. See *Oberg*, 512 U.S. at 426-427; *Doehr*, 501 U.S. at 17; *Oliver*, 333 U.S. at 266-267.

The longstanding practice described above comports with the common-sense notion that it is unfair and unseemly to be tried by a decisionmaker with a substantial financial stake in the outcome. Both the American Bar Association's Code of Judicial Conduct and the Code of Conduct for United States Judges unequivocally bar judges from presiding over lawsuits in which they have a financial interest. See ABA CODE OF JUDICIAL CONDUCT Canon 3C; CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C. The Committee on the federal Code of Conduct has interpreted its disqualification rules to bar a judge who is a member of the class from presiding over a class action brought under Rule 23(b)(3). See Committee on Codes of Conduct, Advisory Opinion No. 90 ("Judges' Duty to Inquire When Relatives May Be Members of Class Action"); see also CODE OF CONDUCT FOR JUDGES Compendium § 3.1-6[4]. ABA Canon 3C has likewise been interpreted to bar a judge from adjudicating a class action lawsuit in which the judge is a class member and stands to receive a monetary reward if the suit is successful. See L. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT 49-50 (1986).

Finally, commentators are unanimous in the view that a substantial financial stake as a member of a certified class should mandate disqualification of a judge from presiding over the class action. See, *e.g.*, Shaman & Fouts, *The Impact of Judicial Relationships on the Appearance of Impartiality*, 11 NO. 4 JUD. COND. RPTR. 1, 5 (Winter 1990); L. ABRAMSON, *supra*, at 50; Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 45-46 (1970). Bluntly put, the commentators agree that "[a] judge who hears a case to which she is party has departed from the judicial ideal to such an extent that she can scarcely be considered a

judge at all." Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 285 (1987); see also Allison, *A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest*, 32 AM. BUS. L.J. 481, 514 (1995) ("[D]ecision-maker economic interests will always be among the worst kinds of biasing influence even if not the worst in every case.").

In short, there is no support whatsoever — state or federal, common law or statutory, regulatory or academic — for the position adopted by the lower courts in this case.

* * * * *

No principle of our judicial system is more fundamental or has a more established pedigree than the requirement of a neutral and disinterested decisionmaker. Indeed, even where a judge believes that his financial stake will not lead to actual bias, the interests underlying the Due Process Clause mandate disqualification. See Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. ASS'N BAR OF CITY OF NEW YORK 694, 700 (Nov. 1973). As the Chief Justice has observed, a judge "cannot be certain that at least subconsciously he may not be pulled in one direction or another by the prospect of financial benefits on the one hand, or the fear of criticism that he may have acted in view of that prospect, on the other." *Ibid.* Furthermore, the public perception of fairness, and its confidence in the judicial system, "could be shaken by a decision by the judge in a case such as this in favor of his own financial interest." *Ibid.*

Both the reality and the perception of fairness are at stake in this case, and both have been undermined by the Florida courts' conclusion that Judge Kaye's class membership is "legally insufficient" to require his recusal. Given the Florida courts' refusal to rectify this egregious due process violation, this Court should do so.

CONCLUSION

The petition for a writ of certiorari should be granted. Because it is palpably clear that the lower courts have ignored the settled requirements of the Due Process Clause, summary reversal may be appropriate under Rule 16.1. See, *e.g.*, *Pounders* v. *Watson*, 521 U.S. 982 (1997); *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974); *Flower* v. *United States*, 407 U.S. 197 (1972); *Cruz* v. *Beto*, 405 U.S. 319 (1972).

Respectfully submitted.

ANDREW L. FREY
ANDREW H. SCHAPIRO
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Philip Morris Incorporated

JANUARY 2000

RICHARD A. SCHNEIDER
PAUL D. CLEMENT
King & Spalding
191 Peachtree Street
Atlanta, GA 30303
(404) 572-4600

Counsel for Brown & Williamson Tobacco Corp. (for itself and as successor to The American Tobacco Co.)

ARTHUR J. ENGLAND, JR.
DAVID L. ROSS
Greenberg Traurig
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500

JAMES T. NEWSOM
Shook, Hardy & Bacon
One Kansas City Place
1230 Main Street
Kansas City, MO 64105
(816) 474-6500

Counsel for Lorillard, Inc./Lorillard Tobacco Co.

ROBERT F. MCDERMOTT, JR.
ROBERT H. KLONOFF
GREGORY G. KATSAS
Jones, Day, Reavis & Pogue
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

WENDY F. LUMISH
Carlton Fields
100 S.E. 2nd Street
Miami, FL 33131
(305) 530-0050

Counsel for R.J. Reynolds Tobacco Co.

JOSEPH P. MOODHE
Debevoise & Plimpton
875 Third Avenue
New York, NY 10022
(212) 909-6000

Counsel for Council for Tobacco Research

JOSE E. MARTINEZ
Martinez & Gutierrez
601 Brickell Key Drive
Miami, FL 33131
(305) 577-4500

Counsel for Tobacco Institute

APPENDICES

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1999
AUGUST 18, 1999
CASE NO. 99-02080
LOWER TRIBUNAL NO. 94-8273

PHILIP MORRIS INCORPORATED, et al.,
Petitioner(s),

vs.

HOWARD A. ENGLE, M.D., et al.,
Respondent(s).

Following review of this petition for writ of prohibition, it is ordered that said petition is hereby denied. GERSTEN, SHEVIN and SORONDO, JJ., concur.

A True Copy
ATTEST:
MARY CAY BLANKS
Clerk District Court of
Appeal, Third District
By: /s/ Mary Cay Blanks
Deputy Clerk

cc: Robert C. Heim
Norman A. Coll
R. Benjamine Reid
Edward A. Moss
James T. Newsom
Jose E. Martinez
Hon. Robert P. Kaye
Melvin Spaeth
James A. Gould
Joseph P. Moodhe
Stephen N. Zack
Richard M. Kirby
Gordon A. Smith
Mark Hicks
Arthur J. England, Jr.
Stanley M. Rosenblatt
Kelly Anne Luther
Richard T. Woulfe
Michael Fay

APPENDIX B

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA 22 (KAYE)

HOWARD A. ENGLE, M.D., et al.,
Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, et al.,
Defendants

ORDER DENYING DEFENDANTS' MOTION TO DISQUALIFY

This cause having come on to be heard by the Court on Defendants Motion to Disqualify, and the Court Having considered the motion and attached affidavits, and being otherwise fully informed in the premises, it is:

Ordered and Adjudged that the Defendants Motion To Disqualify be and is hereby DENIED as being legally insufficient.

Done and Ordered in Chambers at Miami, Dade County Florida, this 4th Day of August, 1999.

/s/ Robert P. Kaye
ROBERT P. KAYE
CIRCUIT JUDGE

cc: ALL COUNSEL OF RECORD

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1999
NOVEMBER 19, 1999
CASE NO. 99-2080
LOWER TRIBUNAL NO. 94-8273

PHILIP MORRIS INCORPORATED, et al.,
Appellant(s)/Petitioner(s),

vs.

HOWARD A. ENGLE, M.D., et al.,
Appellee(s)/Respondent(s).

Petitioners' motion for leave to file a reply is granted and the reply filed on November 8, 1999 is accepted by the Court.

Upon consideration, petitioners' motion to supplement or for alternative relief is denied. GERSTEN, SHEVIN and SORONDO, JJ., concur.

Petitioners' second motion to supplement the record is denied.

Petitioners; motion for rehearing and/or certfication is hereby denied. GERSTEN, SHEVIN and SORONDO, JJ., concur. Petitioners' motion for rehearing en banc is denied.

A True Copy
ATTEST:
/s/ Mary Cay Blanks
Clerk District Court of
Appeal, Third District

cc:
Robert C. Heim
Edward A. Moss
Stanley M. Rosenblatt
R. Bejamine Reid

Norman A. Coll
Richard T. Woulfe
Jose E. Martinez
James A. Goold
Joseph P. Moodhe
Richard A. Schneider
Michael Fay
Aaron Marks
Mark Hicks
Hon. Robert P. Kaye
Stephen N. Zack
Anthony N. Upshaw
James T. Newsom
Melvin Spaeth
Kelly Anne Luther
Richard M. Kirby
Arthur J. England, Jr.
Dan K. Webb

APPENDIX D

FLA. STAT. 38.02. Suggestion of disqualification; grounds; proceedings on suggestion and effect

In any cause in any of the courts of this state any party to said cause, or any person or corporation interested in the subject matter of such litigation, may at any time before final judgment, if the case be one at law, and at any time before final decree, if the case be one in chancery, show by a suggestion filed in the cause that the judge before whom the cause is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto, or is interested in the result thereof, or that said judge is related to any attorney or counselor of record in said cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to said cause, but such an order shall not be subject to collateral attack. Such suggestions shall be filed in the cause within 30 days after the party filing the suggestion, or the party's attorney, or attorneys, of record, or either of them, learned of such disqualification, otherwise the ground, or grounds, of disqualification shall be taken and considered as waived. If the truth of any suggestion appear for the record in said cause, the said judge shall forthwith enter an order reciting the filing of the suggestion, the grounds of his or her disqualification, and declaring from the record in said cause, the judge may by order entered therein require the filing in the cause of affidavits touching the trust or falsity of such suggestion. If the judge finds that the suggestion is true, he or she shall forthwith enter an order reciting the ground of his or her disqualification and declaring himself or herself disqualified in the cause; if the judge find that the suggestion is false, he or she shall forthwith enter the order so reciting and declaring himself or herself to be qualified in the cause. Any such order declaring a judge to be disqualified shall not be subject to collateral attack nor shall it be subject to review. Any such order declaring a judge qualified shall not be subject to collateral attack but shall

be subject to review by the court having appellate jurisdiction of the cause in connection with which the order was entered.

FLA. STAT. 38.04. Sworn statement by judge holding himself or herself qualified

Whenever any judge shall enter an order under s. 38.02 declaring qualification to act in said cause, he or she shall contemporaneously therewith file therein a sworn statement that to the best of his or her knowledge and belief the ground or grounds of the disqualification named in the suggestion do not exist.

FLA. STAT. 38.10. Disqualification of judge for prejudice; application; affidavits; etc.

Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and hold that it is then a fact that he or she does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their

respective interests, he or she shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

FLA. R. JUD. ADMIN. 2.160. Disqualification of Trial Judges.

(a) Application. This rules applies only to county and circuit judges in all matter in all divisions of court.

(b) Parties. Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.

(c) Motion. A motion to disqualify shall be in writing and specifically allege the facts and reasons relied on to show the grounds for disqualification and shall be sworn to by the party by signing the motion under oath or by a separate affidavit. The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith.

(d) Grounds. A motion to disqualify shall show:

(1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or

(2) that the judge before whom the case is pending or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to the cause.

(e) Time. A motion to disqualify shall be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling. Any motion for disqualification made during a trial must be based on

facts discovered during the trial and may be stated on the record and shall also be filed in writing in compliance with subdivision (c). Such trial motions shall be ruled on immediately.

(f) Determination - Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on trust of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

(g) Determination - Successive Motions. If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may pass on the truth of the facts alleged in support of the motion.

(h) Prior Rulings. Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.

(i) Judge's Initiative. Nothing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative.

FLA. CODE OF JUDICIAL CONDUCT Canon 3(E). Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should keep informed about the judge's personal fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household.

MOTION FILED
MAR 0 1 2000

(2)

No. 99-1277

IN THE

Supreme Court of the United States

PHILIP MORRIS INCORPORATED, ET AL.,
Petitioners,

v.

HOWARD A. ENGLE, M.D. ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal for the Third District

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

SAMUEL ESTREICHER
(Counsel of Record)
O'MELVENY & MYERS LLP
Citicorp Center
153 East 53rd Street
54th Floor
New York, NY 10022-4611
(212) 326-2225

JOHN H. BEISNER
CRYSTAL NIX
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
202-383-5300

Counsel for Amicus Curiae The Chamber of Commerce of the United States

1988

IN THE

Supreme Court of the United States

No. 99-1277

PHILIP MORRIS INCORPORATED, ET AL.,
Petitioners,

v.

HOWARD A. ENGLE, M.D. ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal for the Third District

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37(2)(b), the Chamber of Commerce of the United States ("the Chamber") respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the Petition for Writ of Certiorari in this case. The written consent of the petitioners has been filed with the Clerk of the Court. Counsel for the respondents has refused to consent to the filing of this brief.

The Chamber is the nation's largest business federation representing an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business, and in every state. As the principal voice of American business, the Chamber regularly advocates the interests of its members in court on issues of critical concern to the business community. This case is significant to the Chamber and all of its members who rightly expect impartiality from a neutral arbiter.

The question presented in the Petition is whether a trial court judge with a direct personal stake in the outcome of this litigation may continue to serve as the presiding judge in a multi-billion dollar class action lawsuit, when he is a former smoker, he suffers from illnesses of the type respondents claim were caused by petitioners, and his membership in respondents' class is undisputed. The judge's failure to recuse himself – effectively sanctioned by the Florida appellate courts given their refusal to grant review – conflicts with the settled law of this Court, and threatens the constitutional rights not only of petitioners but of corporate and institutional defendants nationwide. This case is thus of great concern to the business community because of the due process rights at stake and the dangerous precedent the trial court's decision would set by undermining a bedrock constitutional principle – that judicial decision-makers must be neutral and impartial both in reality and appearance.

In filing a brief as *amicus curiae*, the Chamber seeks to supplement, rather than duplicate, petitioners' arguments. While petitioners certainly assert a similar interest in this appeal, they necessarily do so from the far more limited perspective of litigants in a particular industry seeking to protect their interests in this case-specific context. The Chamber, in its *amicus* brief, provides this Court with the broader perspective and concerns of the overall American business community. The Chamber's brief, moreover, details the risk of potential linkage between the judge's personal circumstances and his legal rulings. In light of the Chamber's special perspective, the Chamber's brief plainly falls within the category of submissions likely to aid the Court's work because it "'inform[s] the court of interests other than those represented by the parties, and . . . focus[es] the court's attention on the broader implication[s] of various possible rulings.'" Robert L. Stern et al., *Supreme Court Practice* 562 (7th ed. 1993).

For the reasons given, *amicus* The Chamber of Commerce for the United States therefore respectfully requests leave to file the accompanying brief.

Respectfully submitted,

Samuel Estreicher

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

SAMUEL ESTREICHER
(Counsel of Record)
O'MELVENY & MYERS LLP
Citicorp Center
153 East 53rd Street
54th Floor
New York, NY 10022-4611
(212) 326-2225

JOHN H. BEISNER
CRYSTAL NIX
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Counsel for Amicus Curiae The Chamber of Commerce of the United States

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE TRIAL JUDGE'S FAILURE TO RECUSE HIMSELF CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF DUE PROCESS. 5

II. SUMMARY REVERSAL IS WARRANTED AND IS CONSISTENT WITH PREVIOUS USES OF RULE 16.1. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Life Insurance Co. v. Lavoie,
475 U.S. 813 (1986) 3, 6

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996) 7, 8, 9

Bracy v. Gramley,
520 U.S. 899 (1997) 5

Engle v. R.J. Reynolds Tobacco Co.,
No. 94-08273 CA 22 (Fla. Cir. Ct. Aug. 2, 1999) 3

Garcia v. Garcia,
743 So. 2d 1225 (Fla. Dist. Ct. App. 1999) 4

Goldberg v. Kelley,
397 U.S. 254 (1970) 7

Hunter v. Bryant,
502 U.S. 224 (1991) 10

Mireles v. Waco,
502 U.S. 9 (1991) 10

Morrisey v. Brewer,
408 U.S. 471 (1972) 6, 7

Olden v. Kentucky,
488 U.S. 227 (1988) 11

Pabian v. Pabian,
469 So. 2d 189 (Fla. Dist. Ct. App. 1985) 4

Pease v. Hansen,
404 U.S. 70 (1971) 11

Pennsylvania v. Bruder,
488 U.S. 9 (1988) 11

Proprietors Insurance Co. v. Valsecchi,
385 So. 2d 749 (Fla. Dist. Ct. App. 1980) 4

R.J. Reynolds Tobacco Co. v. Engle,
672 So. 2d 39 (Fla. Dist. Ct. App. 1996) 3

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 10, 11

Smith v. Ohio,
494 U.S. 541 (1990) 11

Tumey v. Ohio,
273 U.S. 510 (1927) 6

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 6

Withrow v. Larkin,
421 U.S. 35 (1975) 3

OTHER AUTHORITIES

The Honorable William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 Rec. A.B. City N.Y. 694 (1973) 6

Robert L. Stern et al., *Supreme Court Practice* (7th ed. 1993) 11

Laurence H. Tribe, *American Constitutional Law* § 10-16 (2d ed. 1988) 5

RULES

Fla. R. App. P. 9.310(b)(1) 4

IN THE

Supreme Court of the United States

No. 99-1277

PHILIP MORRIS INCORPORATED, ET AL.,
Petitioners,

v.

HOWARD A. ENGLE, M.D. ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal for the Third District

BRIEF *AMICUS CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus curiae, the Chamber of Commerce of the United States of America ("the Chamber"), is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations, with 140,000 direct members, in every size, sector, and geographic region of the country.[1]

The Chamber regularly advances the interests of its members in court on issues of critical concern to the business

[1] No counsel of any party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

community, and has filed *amicus* briefs in more than 500 cases before this Court, the United States Courts of Appeals, and various state supreme courts. The Chamber has participated as *amicus curiae* in nearly every constitutional punitive damages case in recent years,[2] and also has filed *amicus* briefs in numerous cases addressing issues of class certification.[3] However, it has never before participated in a case such as this where, in blatant violation of elemental due process, the judge making decisions regarding a class of possibly over three quarters of a million people and seeking compensatory and punitive damages of more than $200 billion is himself a member of the respondents' class who stands to profit from his own rulings. The precedent set by the Florida appellate courts in sanctioning Judge Kaye's refusal to recuse himself from presiding over the *Engle* class action reverberates far beyond the merits of this case. It is a serious threat to any defendant, corporate or otherwise, who rightly expects impartiality before a neutral arbiter. As the principal voice of the U.S. business community, the Chamber is well situated to address the due process concerns raised by the judge's misconduct and its impact on the integrity of the legal system.

---

[2] These cases include *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); and *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

[3] These cases include *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *State Farm Mutual Auto Insurance Co. v. Speroni*, 119 S. Ct. 276 (1998); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); and *Washington Mutual Bank, FA v. Superior Court*, No. S070418 (Cal. Aug. 26, 1999) (pending).

SUMMARY OF ARGUMENT

This case threatens fundamental principles of due process. Despite a clear and undisputed personal and financial involvement in the outcome of this case as a member of the respondents' class, the trial judge, Robert P. Kaye, has refused to recuse himself from presiding over the *Engle* class action litigation. Judge Kaye has reached that decision despite unequivocal case law from this Court, and indeed every American jurisdiction, mandating the principle that litigants have a right to an impartial forum before an arbiter with no personal interest in the outcome of the case. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975).

That principle has been plainly violated. Judge Kaye, a former smoker, has a heart disease that is of the type that respondents allege was caused by petitioners. *See* Petition at 6 (citing Motion to Disqualify, Exh. A., *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA 22 (Fla. Cir. Ct. Aug. 2, 1999)); *see also id.* at 14. Indeed, respondents' entire theory of the case is that individuals who suffer from angina and arteriosclerosis (the very diseases Judge Kaye has) as a result of being smokers (which Judge Kaye formerly was) fall within the class definition, which includes

> [a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.

R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 40 (Fla. Dist. Ct. App. 1996). Neither Judge Kaye, respondents, nor the Florida courts have disputed Judge Kaye's illnesses, his status as a former smoker, or his membership in the class.

Because Judge Kaye's diseases place him squarely within the class of litigants – estimated by respondents to include 225,000 to 850,000 individuals – he (like other class members) stands to benefit significantly from the litigation if

the pending multi-billion dollar lawsuit succeeds. The stakes are enormous; respondents seek more than $200 billion in compensatory and punitive damages – a judgment at this level is likely to be unbondable, impeding for all practical purposes an appeal from Judge Kaye's rulings.[4] And Judge Kaye's individual stake has the potential to be quite substantial. Under respondents' own estimates, each class member would receive an award of $209,000 per person – a per-person award figure that would be substantially increased if, as is likely, the class size and number of successful litigants is reduced.

Ironically, in light of his condition, Judge Kaye likely would not have permitted himself to be a *juror* in this case. Recognizing the risk of bias – both real and perceived – from current and former smokers, Judge Kaye disqualified hundreds of potential jurors with conditions similar to his own. *See* Petition at 4-5. These disqualifications were a correct and necessary application of the law preserving the impartiality of the judicial process. Yet, Judge Kaye failed to apply these standards to his own circumstances. He declined to recuse himself as the *presiding judge* – a role that has as much, if not more, pervasive impact than that of a juror. His failure to remove himself, and thus make way for the appointment of a neutral decision maker, contravenes

---

[4] *See Proprietors Ins. Co. v. Valsecchi*, 385 So. 2d 749, 750 (Fla. Dist. Ct. App. 1980) (quoting Fla. R. A[illegible] P. 9.310(b)(1) (requiring that litigants appealing an adverse final money judgment "may obtain an automatic stay pending appeal . . . by posting a good and sufficient supersedeas bond in the amount ordered to be paid by said money judgment plus 15 percent thereof")); *Garcia v. Garcia*, 743 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1999) (same); *Pabian v. Pabian*, 469 So. 2d 189, 190 (Fla. Dist. Ct. App. 1985) ("A stay pending review may be conditioned upon the posting of a good and sufficient bond, other conditions, or both."); *see id.* at 191 ("the guiding principle in setting a supersedeas bond is to protect the party in whose favor judgment was entered by assuring its payment in the event the judgment is affirmed on appeal").

seminal decisions of this Court, undermines the constitutional rights of litigants, derogates from the integrity of the legal process, and erodes the public's confidence in the judicial system itself. In light of the magnitude of the judge's error (effectively sanctioned by the Florida appellate courts by their refusal to grant review), and the sweeping ramifications of that decision – for litigants, the public, and fundamental constitutional norms – this Court's intervention is necessary. *Amicus* therefore urges this Court to grant the Petition for plenary review or, at the very least, for purposes of summarily reversing the decision below pursuant to Supreme Court Rule 16.1.

ARGUMENT

I. THE TRIAL JUDGE'S FAILURE TO RECUSE HIMSELF CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF DUE PROCESS.

The Due Process Clause embodies two important principles. First, litigants must be guaranteed a free and fair trial, and second, an impartial decision-maker is essential to safeguard the fairness and integrity of the judicial process. As this Court stated in *Bracy v. Gramley*, 520 U.S. 899 (1997):

> the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' before a judge with no actual bias against the defendant or interest in the outcome of his particular case.

Id. at 904-05 (citations omitted). Because of this Court's appropriate concern with the moral integrity of the law, even decision-makers with "no actual bias" may be disqualified if there is even the perception of bias since "the appearance of evenhanded justice . . . is at the core of due process." Laurence H. Tribe, *American Constitutional Law* § 10-16, at 745 & n.3 (2d ed. 1988) (citing cases).

As this Court's precedents make clear, an important indicator of judicial bias is a direct, personal financial stake in the outcome of litigation. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Although hesitant to define with "precision" when a judge must be disqualified from a case, this Court has recognized that

> a reasonable formulation of the issue is whether the "situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). There is a risk, Chief Justice Rehnquist has aptly observed, that a judge with a personal stake in a case will either over- or under-compensate as a result of "the prospect of financial benefits on the hand, or the fear of criticism that he may have acted in view of that prospect, on the other." The Honorable William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 A.B. City N.Y. 694, 700 (1973). A pull in *either* direction corrupts the judicial process and impedes the neutrality and agnosticism about outcomes that judges must have, in reality and in the eyes of the public.

The constitutional imperative that triers-of-fact must have no direct personal involvement in a case is deeply rooted in this Court's precedents. For instance, in *Morrisey v. Brewer*, 408 U.S. 471 (1972), this Court held that due process requires that after an arrest, the determination of whether a "reasonable ground exists for revocation of parole should be made by someone not directly involved in the case." *Id.* at 485. Significantly, the Court stated:

> [W]e need make no assumptions one way or the other to conclude that there should be an uninvolved person to make [a] preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making

> recommendations *cannot always have complete objectivity in evaluating them.*"

Id. at 485-86 (emphasis added); *see also Goldberg v. Kelley*, 397 U.S. 254, 271 (1970). Here, too, when the presiding judge, as a member of the respondents' class, has a direct, personal financial stake in the outcome of litigation, no matter how well-intentioned he may be, there is the unmistakable danger that he will lack the "complete objectivity" necessary to adjudicate the case. Although *amicus* has no knowledge that Judge Kaye has issued legal rulings as a result of his membership in the class or his ability to potentially benefit financially from the litigation, his personal circumstances create both a perception and a real risk of actual bias, denying petitioners a free and fair trial guaranteed by the Due Process Clause.

Indeed, throughout this litigation, Judge Kaye has made a series of decisions that, at a minimum, create the perception of bias, undermining the overarching requirement that decision-makers be neutral in both fact and in appearance. Perhaps Judge Kaye's most troublesome decision is the unprecedented bifurcated trial process he has established. Under his approach, the jury adjudicating the multi-defendant class action litigation in Florida will determine whether petitioners must pay a lump-sum punitive damages award *prior to*, and wholly apart from, any consideration of petitioners' liability to individual class members for compensatory damages. This process is patently at odds with this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), which requires a close connection between the degree of damage caused by the defendant and the size of any punitive award.

During Phase 1 of the *Engle* trial, the jury considered only the so-called "common" classwide issues involving petitioners' alleged conduct. The jury was not required, however, to determine (i) whether petitioners' conduct, in

fact, caused cognizable injury to the named or unnamed class members; (ii) whether, and to what extent, such respondents are entitled to compensatory relief of any kind; or (iii) even to specify whether any particular conduct of the petitioners supported any punitive damages findings. Those issues will not be resolved until Phase 3 of the trial *after a different jury* in Phase 2 already has decided whether to impose a lump-sum punitive damages award based on the generalized harm petitioners allegedly caused the class as a whole. This process inverts the proper constitutional sequence, putting the "cart" (punitive damages) before the proverbial "horse" (liability and compensatory damages determinations) and necessitates the convening of multiple juries – all squarely in conflict with the standards articulated by *Gore* and its progeny.

Specifically, each of the three factors established in *Gore* to determine whether a punitive award may be sustained – (1) "the degree of reprehensibility" of the conduct that formed the basis of the civil suit; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases," 517 U.S. at 574-75 – requires a *prior* determination of liability and compensatory damages before punitive damages may be imposed.

That is the exact opposite of what Judge Kaye's Order mandates in this case. Indeed, the judge's approach raises the specter that a jury will impose punitive damages without any evaluation of the evidence applicable to the host of named and unnamed class members, without any examination of whether there are mitigating factors that reduce or eliminate petitioners' liability, and without any assessment of whether there are justifiable affirmative defenses that either extinguish legal blame altogether or reduce the reprehensibility of petitioners' conduct. *See Gore*, 517 U.S. at 576 ("all acts that cause economic harm

[are not invariably converted] into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages"). The fact that jurors will have no idea how many class members can establish cognizable injury attributable to the petitioners, and of what nature such injury may be, further distorts the process. Clearly, a jury's assessment of the need and justification for punitive damages should and – but for the Order below – would vary significantly depending on whether the class is comprised of 200, 2,000 or 2 million members or whether the injuries are minor, critical, or incurable. The process the judge has set in motion thus raises the unacceptable risk that "punitive damages may . . . be 'grossly out of proportion to the severity of the offense,'" 517 U.S. at 576, in violation of the central due process holding in *Gore*.

Under the judge's Order, moreover, one jury could well impose a fixed, astronomical punitive damages award during Phase 2 of the trial while a different jury in Phase 3 could discover that only a small fraction of the class actually can establish cognizable injury and entitlement to compensatory and punitive damages. Such a result – reached years after the award of punitives by the prior jury – would create an enormous windfall for the successful class members (who may include Judge Kaye himself), who then will receive a pro rata punitive award grossly out of proportion to proven compensatory losses. That the initial lump-sum punitive award might be reduced on appeal does not obviate the constitutional concerns caused by the trial court's Order or reduce the *in terrorem* effect of massive punitive liability inducing settlement at excessive values well before review can be obtained.

In short, the bifurcated process the judge has authorized – together with his personal stake in the litigation – will send defendants engaged in class action litigation the disturbing signal that the judicial process they face may not be conducted in the traditional manner and in

accordance with constitutional norms. Although the bifurcated trial is not yet ripe for this Court's review, the recusal decision is appropriate for, and warrants, immediate action. Indeed, if review is not had now, it may not be available as a practical matter later in this litigation. The sheer magnitude of the punitive damages award contemplated by Judge Kaye's unprecedented bifurcation ruling raises the specter of an unbondable judgment. *See supra* at 6 & n.4. Such a result effectively would nullify any right of appeal and compel petitioners, irrespective of their view of the merits of respondents' claims and out of sheer self-preservation, to settle the case, and thus fall prey to what has been termed a legally sanctioned form of blackmail. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (acknowledging Judge Henry J. Friendly's statement that "settlements induced by a small probability of an immense judgment in a class action [are] 'blackmail settlements.'").

Reversal of the decision below is thus necessary not only to protect petitioners' rights in this case but to safeguard important constitutional norms and preserve the public's confidence in, and the integrity of, the judicial system.

II. SUMMARY REVERSAL IS WARRANTED AND IS CONSISTENT WITH PREVIOUS USES OF RULE 16.1.

Because Judge Kaye's recusal from this case was so clearly mandated by governing law, *amicus* urges the Court to grant the Petition either for consideration on the merits or for summary disposition under Supreme Court Rule 16.1. The latter disposition also is appropriate because the recusal decision conflicts squarely with settled Supreme Court law, and thus falls within the category of cases this Court has granted for purposes of summary disposition without a full hearing on the merits. *See, e.g., Mireles v. Waco*, 502 U.S. 9 (1991); *Hunter v. Bryant*, 502 U.S. 224 (1991); *Smith v.*

Ohio, 494 U.S. 541 (1990), *Olden v. Kentucky*, 488 U.S. 227 (1988); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988); *Pease v. Hansen*, 404 U.S. 70 (1971). All of these cases – and numerous others like them – involve instances in which "the lower court result is so clearly erroneous . . . that full briefing and argument" is unnecessary. Robert L. Stern et al., *Supreme Court Practice* 247 (7th ed. 1993).

By sanctioning Judge Kaye's continued involvement in this case, the Florida appellate courts in this case not only have ignored their responsibilities under the Supremacy Clause, but have done so in a setting where the sheer enormity of the stakes may preclude as a practical matter petitioners' right of appeal.

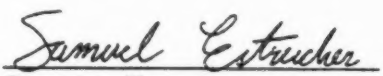
Without this Court's intervention, petitioners' right to a free and fair trial adjudicated by an impartial decision-maker will be defeated. But the costs of Judge Kaye's errors will be visited well beyond this case. To allow Judge Kaye's continued involvement in this case – the inevitable result of a denial of certiorari – would threaten the expectations of litigants nationwide that their cases will be adjudicated by neutral and impartial decision-makers. If that expectation is diminished, corporate and other institutional defendants lacking confidence that they will receive a fair trial may feel pressure to submit to "'blackmail settlements,'" *Rhone-Poulenc*, 51 F.3d at 1298, by settling cases that on their merits should be litigated, and the public may grow increasingly cynical of the fairness and integrity of the judicial system. To avoid such consequences – precisely the kinds of harms the Due Process Clause aims to prevent – review of the Petition is urgently needed.

CONCLUSION

For the reasons stated, *amicus* The Chamber of Commerce of the United States respectfully requests that this Court grant the Petition for plenary review or for purposes of

summarily reversing the trial court's recusal decision consistent with Supreme Court Rule 16.1.

Respectfully submitted,



ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

SAMUEL ESTREICHER
(Counsel of Record)
O'MELVENY & MYERS LLP
Citicorp Center
153 East 53rd Street
54th Floor
New York, NY 10022-4611
(212) 326-2225

JOHN H. BEISNER
CRYSTAL NIX
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Counsel for Amicus Curiae The Chamber of Commerce of the United States

Supreme Court, U.S.
FILED
APR 17
CLERK

(3)

No. 99-1277

In The

Supreme Court of the United States

PHILIP MORRIS, INCORPORATED, ET AL.,

Petitioners,

v.

HOWARD A. ENGLE, M.D., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Florida District Court Of Appeal For The Third District

RESPONDENTS' BRIEF IN OPPOSITION

STANLEY M. ROSENBLATT
Counsel of Record

SUSAN ROSENBLATT
SHERRIE J. COHEN

STANLEY M. ROSENBLATT, P.A.
66 West Flagler Street
12th Floor, Concord Building
Miami, Florida 33130
(305) 374-6131

Counsel for Respondents Florida Engle Class

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38pp

QUESTIONS PRESENTED[1]

I. Whether there are independent and adequate state grounds for the denial of the untimely and legally insufficient motion to disqualify the state trial judge.

II. Where state law prohibits a judge from refuting allegations against him of bias and prejudice in ruling on a motion to disqualify, is the judge's required silence an admission of the accusations against him.

---

[1] The petitioners' "Question Presented" is based on the false assumption that the trial judge is a member of the class. As this Brief in Opposition demonstrates, the petitioners did not make that claim in the Florida appellate court rendering the decision leading to their petition, and neither the record nor the law support the petitioners' extravagant submission.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding, except that Liggett Group, Inc., and Brooke Group, Ltd., Inc. are defendants in the state court trial and are not respondents in this proceeding.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

JURISDICTION 1

STATEMENT OF THE CASE 1

A. Judge Kaye Has Presided Over Two Tobacco Class Actions 2

B. Motion to Disqualify State Court Judge Robert P. Kaye 4

C. Petitioners File Their Petition for Writ of Prohibition Before the Third District Court of Appeal of Florida 7

D. Petitioners Continue to File Motions to Disqualify Judge Kaye; Judge Kaye Remains Unable to Refute Charges of Class Membership 10

E. The Statement of Facts of Petitioners is Dramatically Distorted 10

REASONS FOR DENYING THE WRIT 12

I. THIS COURT LACKS JURISDICTION OVER THIS CASE 14

A. The Decision Below Rests on State Law ... 14

B. The Decision Below is Not a Final Decision Rendered by the Highest Florida State Court 22

TABLE OF CONTENTS – Continued

Page

II. THE FLORIDA STATE JUDGE'S REQUIRED SILENCE IS NOT AN ADMISSION OF CLASS MEMBERSHIP AND PREJUDICE WHERE FLORIDA LAW PROHIBITS THE JUDGE FROM REFUTING ALLEGATIONS AGAINST HIM IN RULING ON A MOTION TO DISQUALIFY 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Barwick v. State, 660 So. 2d 685 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996) 1, 12, 13, 18, 21, 24

Bolling v. Lersner, 91 U.S. 594 (1875) 18

Broin v. Philip Morris Companies, Inc., 641 So. 2d 888 (Fla. 3d DCA 1994), *rev. denied*, 654 So. 2d 919 (Fla. 1995) 2, 11

Brown v. St. George Island, Ltd., 561 So. 2d 253 (Fla. 1990) 26

Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978) 20

California v. Rooney, 483 U.S. 307 (1987) 24

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) .. 22, 23

Douglass v. Douglas, 633 So. 2d 1166 (Fla. 1st DCA 1994) 28

Dragovich v. State, 492 So. 2d 350 (Fla. 1986) 13

Durley v. Mayo, 351 U.S. 277 (1956) 1, 14

Ex Parte American Steel Barrel Co., 230 U.S. 35 (1912) 22

Fischer v. Knuck, 497 So. 2d 240 (Fla. 1986) ... 13, 20, 26

Gilliam v. State, 582 So. 2d 610 (Fla. 1991) 22

Guzman & Co. v. British Realty & Mortgage Corp., 699 So. 2d 842 (Fla. 3d DCA 1997) 18

Henry v. State, 649 So. 2d 1361 (Fla. 1994), *cert. denied*, 516 U.S 830 (1995) 24

Hooks v. State, 207 So. 2d 459 (Fla. 2d DCA 1968) .. 25, 26

In re: Amendments to Rules of Civil Procedure, 458 So. 2d 245 (Fla. 1984) 6, 28, 29

TABLE OF AUTHORITIES – Continued

Page

Jackson v. State, 599 So. 2d 103 (Fla.), *cert. denied*, 506 U.S. 1004 (1992) 21

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75 (1997) 1, 22, 23

Lawrence v. Chater, 516 U.S. 163 (1996) 17

Liteky v. United States, 510 U.S. 540 (1994) 22

Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934) 15

Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548 (1945) 22

Mullen v. Western Union Beef Co., 173 U.S. 116 (1899) 23

Neblett v. Carpenter, 305 U.S. 297 (1938) 14

Preston v. Chicago, 226 U.S. 447 (1913) 1, 14

R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. 3d DCA), *rev. denied*, 682 So. 2d 1100 (Fla. 1996) 3, 11, 25

Rivera v. State, 717 So. 2d 477 (Fla. 1998) 19

Rogers v. State, 630 So. 2d 513 (Fla. 1993) 6, 13, 20, 26, 27

Sochor v. Florida, 504 U.S. 527 (1992) 1, 14

Steinhorst v. State, 636 So. 2d 498 (Fla. 1994) 18, 19

Steinhorst v. State, 695 So. 2d 1245 (Fla. 1997), *cert. denied*, 522 U.S. 1022 (1998) 18

TABLE OF AUTHORITIES – Continued

Page

Stembridge v. Georgia, 343 U.S. 541 (1952) 15

Strazzula v. Hendrick, 177 So. 2d 1 (Fla. 1965) 24

The Florida Bar Re: Amendment to Florida Rules of Judicial Administration, 609 So. 2d 465 (Fla. 1992) 6, 26, 28

Williams v. Kaiser, 323 U.S. 471 (1945) 15

STATUTES & RULES

28 U.S.C. § 1257 ..... 1, 22, 23, 24

FLA. R. APP. P. 9.030 ..... 1, 24

FLA. R. APP. P. 9.100 ..... 13, 28, 29

FLA. R. APP. P. 9.110 24

FLA. R. JUD. ADMIN. 2.160 ..... *passim*

FLA. STAT. § 38.02 6

FLA. STAT. § 38.04 29

FLA. STAT. § 38.10 6

OTHER AUTHORITIES

Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) 15

David Burns, et al., *Cigarette Smoking Behavior in the United States*, in *Changes in Cigarette-Related Disease Risks and Their Implication for Prevention and Control*, SMOKING AND TOBACCO CONTROL MONOGRAPH NO. 8 (National Cancer Institute, Burns, David, et al., ed. 1997) 9

TABLE OF AUTHORITIES – Continued

Page

Donald R. Shopland, *Tobacco Use and Its Contribution to Early Cancer Mortality with a Special Emphasis on Cigarette Smoking*, 103 ENVIRONMENTAL HEALTH PERSPECTIVES 131 (Nov. 1995) 9

ROBERT L. STERN ET AL., SUPREME COURT PRACTICE (7th ed. 1993) 15, 17

JURISDICTION

The decision below rests on adequate and independent state grounds. *See Sochor v. Florida*, 504 U.S. 527, 119 L. Ed. 2d 326, 338 (1992); *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *Preston v. Chicago*, 226 U.S. 447, 450 (1913). Under Florida law, a motion to disqualify is legally insufficient where based upon rumor and gossip from unidentified people, at unidentified times and under unidentified circumstances. *See Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996).

The decision below is by a state intermediate appellate court and was not rendered by the highest state court in which a decision could be had. 28 U.S.C. § 1257. Upon final judgment, petitioners may appeal to the intermediate appellate court and then invoke the discretionary jurisdiction of the Florida Supreme Court. *See* FLA. R. APP. P. 9.030(a)(2). Thus the decision is subject to further review in a state tribunal and is not an effective determination of the litigation. *See Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S. Ct. 481, 485-86 (1997). If the Florida Supreme Court does not accept jurisdiction the petitioners may seek review in this Court following a final judgment.

STATEMENT OF THE CASE

The petition is premised upon the erroneous assumption that the state court trial judge is a member of the plaintiff class of injured smokers. Stripped of that false premise, there is no basis for certiorari.

The motion to disqualify Judge Robert P. Kaye was filed pursuant to Florida Statutes and the Florida Rules of Judicial Administration which prohibit a trial judge from refuting the truth of allegations when ruling on a motion to disqualify for alleged bias or prejudice. Judge Kaye's denial of the motion to disqualify and the Florida appellate court's denial of the writ of prohibition do not constitute factual or legal support for petitioners' premise that Judge Kaye is a class member.

A. Judge Kaye Has Presided Over Two Tobacco Class Actions.

Judge Kaye has presided over tobacco litigation in Florida in which these petitioners have been the defendants for nearly nine years, beginning with *Broin v. Philip Morris*, No. 91-49738 CA (22), Circuit Court for the Eleventh Judicial Circuit, Dade County, Florida (1991) (the "flight attendant" secondhand smoking case). Judge Kaye's dismissal with prejudice of all class action claims in that case was reversed. *Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888 (Fla. 3d DCA 1994), *rev. denied*, 654 So. 2d 919 (Fla. 1995).

On remand, Judge Kaye certified the flight attendant class, stating his disagreement with class treatment:

> The court at the time it issued its first ruling that resulted in reversal, was and still is as of this writing deeply concerned with the issue of "causation". . . . [D]espite the class action, each case will require a trial, not only on damages, but also on causation. Whether this obviates the theory of "class action" or is merely putting the

> cart before the horse I leave to wiser members of the judiciary.

Certification Order, December 12, 1994, at 3-4.

The Florida Engle smokers' class action was filed on May 10, 1994, against the same tobacco defendants and was assigned to state court Judge Harold Solomon. Judge Solomon certified a nationwide class of injured smokers and their survivors on October 31, 1994. That class was reduced by size to a class of Florida citizens and residents and their survivors. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. 3d DCA), *rev. denied*, 682 So. 2d 1100 (Fla. 1996). After Judge Solomon retired, the successor judge, Judge Alan Postman, entered a trial plan where punitive damages would be determined for the class during the Phase I trial on a ratio basis. The successor judge recused himself for health reasons and the Engle case was reassigned to Judge Robert P. Kaye in March 1998. The Phase I trial on liability commenced before Judge Kaye in July 1998 with jury selection.

On July 7, 1999, the jury rendered its verdict in Phase I, determining liability in favor of the class, including a finding of entitlement to punitive damages against all Defendants. Judge Kaye previously granted petitioners' motion to postpone the determination as to the amount of punitive damages on a class wide basis, to Phase II. Petitioners' post-trial motions challenging the liability verdict were denied on July 29, 1999. The first portion of the Phase II trial on compensatory damages for class representatives was scheduled for September 1999.

B. Motion to Disqualify State Court Judge Robert P. Kaye.

On August 2, 1999, petitioners filed their motion to disqualify Judge Robert P. Kaye, pursuant to Florida Rule of Judicial Administration 2.160 and Sections 38.02 and 38.10, of the Florida Statutes. The motion included:

(a) The affidavit of local Florida counsel, David L. Ross, a partner in Greenberg Traurig, P.A. and counsel for petitioner Lorillard Tobacco Company, who stated:

> On July 22, 1999, I was discussing this case generally with one of my family members. After that discussion, this family member decided to look for information on the Internet about the case . . . Later that day, this family member found on the Internet and called to my attention a news report written by Noreen Marcus that was apparently published in the Sun Sentinel on **June 8, 1997** . . . The news story refers to Judge Kaye as a "former smoker." . . . Prior to seeing that news story, I was unaware of any information indicating that Judge Kaye was a former smoker.

Motion to Disqualify, Exh. B, at ¶¶ 2-3 (emphasis added).

Defendants attach to their motion copies of various media reports, primarily in 1997; examples of these include:

(i) **Reuters Business Report of June 3, 1997**, reporting a pretrial hearing the week before:

> **The big question has been whether presiding Judge Robert Kaye is himself a smoker.** Courthouse workers said they had never seen Kaye

> smoking, but the Judge refused to comment. "I'm not going to answer that. I'm not going to say anything prejudicial" he said when asked.

Id., Exh. D (emphasis added).

> (ii) **The Lakeland Ledger, June 7, 1997**:
>
> Asked if he was a smoker, the Judge said "I'm not going to answer that. . . . "

Id., Exh. F.

> (iii) *"The Engle v. Tobacco Class Action Lawsuit July 9, 1998, Backgrounder"* by Wanda Hamilton states:
>
> . . . Dade Circuit Judge Robert Kaye, **allegedly a former smoker**. . . . [2]

Id., Exh. H (emphasis added).

(b) The affidavit of Philip Morris' counsel, Robert Heim, a partner in the law firm of Dechert Price & Rhoads, stating that on **June 1, 1999**, he received a phone call from Judge Kaye's judicial assistant advising Heim that the previous week Judge Kaye had been hospitalized with chest pains and had undergone an angioplasty for a blocked artery. *Id.*, Exh. J.

---

[2] The affidavits, motion to disqualify and petition for prohibition state that petitioners' knowledge of Judge Kaye's possible smoking history came about on July 22, 1999 and thereafter as a result of Mr. Ross' unidentified family member surfing the Internet. However, the media report at Exhibit H reflects it was printed and/or distributed on July 21, 1999, one day earlier, creating an irreconcilable conflict. Motion to Disqualify, Exh. H.

(c) The affidavit of Jose E. Martinez, local counsel for the Tobacco Institute, stating that during the week of **June 7, 1999**, Mr. Martinez had a conversation with Judge Kaye in the hallway outside the courtroom during a break in the trial, at which time Judge Kaye advised Martinez that one of his arteries had had blockage. *Id.*, Exh. K.

The motion to disqualify was filed pursuant to Rule 2.160, Florida Rules of Judicial Administration, which prohibits a judge from determining or testing the legal sufficiency of a motion to disqualify for bias or passing on the truth of the facts alleged, where there is a claim that the movant will not receive a fair trial because of prejudice or bias of the judge. Petitioners' motion was also filed pursuant to Section 38.10, Florida Statutes, similarly prohibiting the judge from refuting all allegations of bias or prejudice. Defendants also filed their motion pursuant to Section 38.02, Florida Statutes, which contains a contradictory provision where the judge may refute the allegations.[3]

The trial court considered the motion to disqualify and the attached affidavits and determined that same were "legally insufficient" under state law and denied the motion to disqualify on August 4, 1999. *See* Pet. App. 2a.

---

[3] Section 38.02, Florida Statutes, conflicts with the general rule of Florida Rule of Judicial Administration 2.160(f) so that the Rule would be controlling. *See Rogers v. State*, 630 So. 2d 513, 515 (Fla. 1993); *The Florida Bar Re: Amendment to Florida Rules of Judicial Administration*, 609 So. 2d 465, 466 (Fla. 1992); *In re: Amendments to Rules of Civil Procedure*, 458 So. 2d 245, 247 (Fla. 1984).

C. Petitioners File Their Petition for Writ of Prohibition Before the Third District Court of Appeal of Florida.

On August 12, 1999, petitioners filed a Petition for Writ of Prohibition in the Florida Third District Court of Appeal saying:

> Today, in a Circuit Court in Miami, a judge sits presiding over a case in which he himself **may be a party**.

Petition for Writ of Prohibition at 1 (emphasis added).

> . . . . Even if Judge Kaye is not a member of the plaintiff class, he **may be** in a position to assert a separate claim against one or more of the petitioners based upon his smoking history and medical condition. At the very least, as a former smoker with atherosclerosis, Judge Kaye **may naturally feel sympathetic** toward plaintiffs and aligned with them against petitioners in this case. . . .

Id., at 4 (emphasis added).

> Judge Kaye **May Be** a Member of the Plaintiff Class. Judge Kaye's status as a former smoker with a smoking-related type of disease means that he **may be** a member of the plaintiff class. . . .

Id., at 21 (emphasis added).

> . . . [T]he fact that there **may be uncertainty** about whether Judge Kaye's heart disease was, in fact, caused by his smoking is immaterial. . . .

> Even if Judge Kaye is, for any reason, not technically a class member, he nonetheless has a disqualifying interest in the Engle case . . .
>
> . . . [I]n the event that this Court determines that the factual record is insufficient to demonstrate Judge Kaye's interest in the case, petitioners respectfully request that the Court remand this matter to the trial court. . . .

Id., at 24, 25, 29 (emphasis added).

The Third District Court of Appeal denied the Petition for Writ of Prohibition on August 18, 1999. Petition App. 1a.

The tobacco defendants moved for rehearing, rehearing en banc and/or certification to the Florida Supreme Court, suggesting to the court that the tobacco defendants had doubt as to whether Judge Kaye would be included in the plaintiffs' class:

> . . . In the normal case, there is no doubt about the identity of the parties. In the class action context, however, the situation is entirely different. By their very nature, classes do not permit easy and certain knowledge of precisely which individuals they include. . . .

Motion for Rehearing, Rehearing En Banc and/or Certification, August 27, 1999, at 8-9.

On November 19, 1999, the Third District Court of Appeal denied petitioners' motion for rehearing, rehearing en banc and/or certification, without opinion. While the petition for prohibition was pending before the state appellate court, petitioners filed a motion to supplement the record to include an Associated Press news report of

September 2, 1999, that referred to a comment by a court employee that Judge Kaye had quit smoking in 1960 and that Judge Kaye is not a member of the class. Petitioners argued in their motion to supplement the record that this "new evidence" that Judge Kaye quit smoking approximately forty years earlier[4] was relevant on their motion to disqualify.

While the motion to supplement was pending in the state appellate court, petitioners filed a second motion to supplement the record with excerpts from the expert witness deposition of Dr. Michael Cummings relating to the size and composition of the class. Dr. Cummings was deposed on October 8, 1999, over two months after the motion to disqualify had been filed and ruled upon in the trial court. In the order denying rehearing, the Third District Court of Appeal also denied petitioners' two motions to supplement the record with matters that had never been presented before the trial judge when ruling on the motion to disqualify. *See* Pet. App. 3a. Petitioners

---

[4] The record below reflects that the defendant tobacco companies maintain detailed and sophisticated statistical data as to the levels of consumption of cigarettes during the twentieth century. Statistically, there is an extremely high probability – over eighty percent – that a male of Judge Kaye's age group, approximately sixty-nine to seventy years of age, smoked at one point in his life. *See* David Burns, et al., *Cigarette Smoking Behavior in the United States*, in *Changes in Cigarette-Related Disease Risks and Their Implication for Prevention and Control*, SMOKING AND TOBACCO CONTROL MONOGRAPH NO. 8 (National Cancer Institute, Burns, David, et al., ed. 1997); Donald R. Shopland, *Tobacco Use and Its Contribution to Early Cancer Mortality with a Special Emphasis on Cigarette Smoking*, 103 ENVIRONMENTAL HEALTH PERSPECTIVES 131 (Nov. 1995).

have never presented any of these additional matters before the trial court.

D. Petitioners Continue to File Motions to Disqualify Judge Kaye; Judge Kaye Remains Unable to Refute Charges of Class Membership.

Following the settlement of the *Broin* flight attendant class action against these petitioners, individual lawsuits have been filed on behalf of flight attendants. A number of cases have fallen in Judge Kaye's division and motions to disqualify have been filed by petitioners in these cases. Because, under Florida law, Judge Kaye is precluded from challenging or contesting the truth of the allegations, the trial court may not declare he is not a class member and that he has no interest in these proceedings. *See* FLA. R. JUD. ADMIN. 2.160(f).

E. The Statement of Facts of Petitioners is Dramatically Distorted.

(i) No admissible or credible evidence established that Judge Kaye is a member of the class, yet the petitioners repeat that conclusion as an immutable fact. In the motion to disqualify before the trial court and petition for writ of prohibition before the state appellate court, petitioners showed some restraint and were quite equivocal on the issue of Judge Kaye's possible class membership.

(ii) Contrary to petitioners' assertions, throughout voir dire examination, prospective jurors who were

smokers or former smokers with possible tobacco related illnesses or whose family members had such illnesses, were not automatically excused for cause. The record reflects that petitioners often argued to retain such jurors with smoking related diseases, particularly if the juror or family member quit smoking many years earlier or where a particular juror's responses during voir dire were favorable to the defense. *See, e.g.*, Tr. 9696-9746.

(iii) Contrary to petitioners' assertions, there were many evidentiary and legal rulings throughout Phases I and II that were favorable to petitioners. The petitioners' recitation of Judge Kaye's unfavorable rulings for the defense, Pet. 5, 7-9, are irrelevant here, and simply underscore the petitioners' effort to turn the petition into a vehicle for avoiding the orderly appellate review to which they will be entitled in the Florida court system if they contend that Judge Kaye's decisions during the case denied them of a fair trial. *See R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. 3d DCA), *rev. denied*, 682 So. 2d 1100 (Fla. 1996); *Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888 (Fla. 3d DCA 1994), *rev. denied*, 654 So. 2d 919 (Fla. 1995).

(iv) Contrary to petitioners' assertions, petitioners did not contend in the Third District Court of Appeal that Judge Kaye was a member of the plaintiff class. *See* Pet. 7. Defendants' statements there were equivocal, *see* Petition for Writ of Prohibition at 1, 4, 21, 24-5, 29, with the alternative request for a remand for an evidentiary hearing on the issue of bias and class membership.

REASONS FOR DENYING THE PETITION

The Petition is premised on a single, erroneous assumption – that the state court judge is a class member. Petitioners have taken innuendo, rumor and gossip, combined them with the Florida law requiring the trial judge's silence in ruling on a motion to disqualify, to form a false premise.

Judge Robert P. Kaye has been presiding over tobacco litigation in Dade County state court for close to a decade. Judge Kaye was a favorite of the tobacco industry when in May 1992, he dismissed with prejudice the class action that had been filed in 1991 by flight attendants against the tobacco industry. It was not until an adverse jury verdict in July 1999 in the Florida smokers' class action, and adverse post-trial court rulings, that petitioners pieced together several two-year old news articles and the judge's recent brief illness, hoping to create colorable grounds for disqualification. However, rumors and gossip from or to unidentified people, at unidentified times and under unidentified circumstances are legally insufficient under Florida law to warrant the disqualification of a trial judge. *Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996). Pursuant to state law, the motion to disqualify and the subsequent petition for writ of prohibition in the state appellate court were properly denied since legally insufficient.

Petitioners make the disingenuous argument that the silence of Judge Kaye and class counsel constitute an admission of the Judge's class membership. They are wrong. First, the class was not required to respond to the motion. Nor was there ar y rule to show cause in the state

appellate court requiring a response to the petition from class counsel. The motion and petition were legally insufficient on their face. That is the basis for denial under Florida law. *See Barwick v. State*, 660 So. 2d 685, 691 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996); *Rogers v. State*, 630 So. 2d 513, 516 (Fla. 1993); *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986); *Dragovich v. State*, 492 So. 2d 350, 352 (Fla. 1986). Second, Florida law requires a judge presented with a disqualification motion based in whole or in part on bias to rule only on the legal sufficiency of the motion. *See* FLA. R. JUD. ADMIN. 2.160(f), Pet. App. 7a-8a. The judge is prohibited from refuting or challenging allegations of bias and prejudice, and, indeed, would be disqualified for doing so. Accordingly, no inference of truth may be drawn from the Judge's required silence. *See Rogers v. State*, 630 So. 2d 513, 515-16 (Fla. 1993). Nor may any such inference be drawn should the judge not respond to a prohibition petition:

> . . . Unless otherwise specifically ordered, the judge or lower tribunal has no obligation to file a response. The judge or lower tribunal retains the discretion to file a separate response should the judge or lower tribunal choose to do so. **The absence of a separate response by the judge or lower tribunal shall not be deemed to admit the allegations of the petition.**

FLA. R. APP. P. 9.100(e)(3) (emphasis added).

Stripped of its false premise, the petition has no merit.

I. THIS COURT LACKS JURISDICTION OVER THIS CASE.

A. The Decision Below Rests on State Law.

Petitioners have failed to meet their burden to persuade the Court that the decision below did not rest on adequate or independent state grounds. *See Sochor v. Florida*, 504 U.S. 527, 119 L. Ed. 2d 326, 338 (1992) ("[petitioner] has said nothing in this Court to persuade us that [the state law ground recited by the lower court] is either not adequate or not independent."); *Durley v. Mayo*, 351 U.S. 277, 281 (1956) (the party seeking review must demonstrate that no asserted state ground can account for the decision below).

A state court judgment resting on an independent and adequate state law ground is unreviewable. *See Preston v. Chicago*, 226 U.S. 447, 450 (1913) (state court judgment resting in part upon ruling that relief was barred by laches, cannot be reviewed by U.S. Supreme Court, although petitioner contended he was denied due process); *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938) (decision by a state court amounting merely to an alleged erroneous construction of state statutes is not a denial of due process to be reviewable by the Supreme Court).

Counsel of Record for petitioners has acknowledged that this Court is without jurisdiction where, as here, a judgment or order rests on a state ground:

> Where both state and federal questions are involved in a state proceeding, a jurisdictional problem not infrequently arises as to whether the state court judgment rests on a state law ground or on the federal ground. If in fact the

> judgment rests on a state ground, the Supreme Court has no jurisdiction to review the case. In this circumstance, the state court's ruling with respect to the federal question, even though arguably wrong, becomes superfluous and thus incapable of triggering Supreme Court jurisdiction. And the ruling as to the state issue necessarily reduces the case to the vast field of garden variety state court judgments, dealing with state law only. These judgments, as Justice Brennan once put it, "not only cannot be overturned by, [but] indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such cases."

ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 140-141 (7th ed. 1993), citing Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977).

"Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952); *see also Williams v. Kaiser*, 323 U.S. 471, 477 (1945) ("And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it."); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934) (Where it does not appear whether the judgment of the state court rests on a federal or a state question, and the state ground is independent and sufficient in itself to sustain the judgment, the Supreme Court will not take jurisdiction).

Counsel of record for petitioners has also recognized that where, as here, there is no written opinion and a state ground is raised in the record, there is a presumption that the judgment or order is based on that state ground.

> Where the state court enters no written opinion, despite the raising of both federal and state questions, the Court – again, with the aid of counsel – must turn to the record to determine if the state ground is sufficient to sustain the judgment. **If the state ground raised in the record is found adequate to support the judgment, the Court presumes that the judgment was based on that ground.** That presumption grows out of the principle that there must be some affirmative showing that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause. When this principle is not clearly satisfied, especially because of the presence of an adequate state ground, jurisdiction will be declined. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934); *Adams v. Russell*, 229 U.S. 353, 358-59 (1913); *Woods v. Nierstheimer*, 328 U.S. 211, 216 (1946); *Phyle v. Duffy*, 334 U.S. 431, 437 (1948); *Williams v. Kaiser*, 323 U.S. 471, 477-78 (1945). To overcome that presumption, the party seeking review "must demonstrate that neither of these state grounds can account for the decision below." *Durley v. Mayo*, 351 U.S. 277, 281 (1956). It is not enough to show that the judgment below *"might"* have rested upon a nonfederal ground." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952); *Ellis v. Dickson*, 349 U.S. 458, 459 (1955).

ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 145-46 (7th ed. 1993) (emphasis added).

Here, the Third District Court of Appeal in Florida delivered no opinion[5] and it is apparent that the judgment below rests upon independent and adequate state grounds. First, the trial court found petitioners' disqualification motion to be "legally insufficient." *See* Pet. App. 2a. Petitioners' motion for disqualification was based upon two allegations: the bias or prejudice of the judge, and that the judge may be a class member and therefore have a financial interest in the case. A Florida court presented with a disqualification motion based in whole or part on bias "shall determine only the legal sufficiency of the [disqualification] motion and shall not pass on the truth of the facts alleged. . . . No other reason for denial shall be stated, and an order of denial shall not take issue with the motion." FLA. R. JUD. ADMIN. 2.160(f), Pet. App. 7a-8a.

In support of their disqualification motion, petitioners attach what purport to be several 1997, 1998 and 1999 news articles printed from the Internet that allege that the judge may have been or was at one time a former

---

[5] The fact that the Third District delivered no opinion also bears significance as a prudential consideration relevant to this Court's exercise of its discretionary jurisdiction. "[W]e are well aware, as are Supreme Court practitioners and lower courts, that while not immune from our plenary review, ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance that we generally look for in deciding whether to exercise our discretion to grant plenary review." *Lawrence v. Chater*, 516 U.S. 163, 133 L. Ed. 2d 545, 556 (1996).

smoker. Motion to Disqualify, Exhs. C-I. These articles fail to identify any sources of information and provide no other information as to whether the judge was a smoker for two weeks or two months, if at all. Under Florida law, a disqualification motion is legally insufficient where it is based upon rumor and gossip from unidentified people, at unidentified times, and under unidentified circumstances. *See Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996). Accordingly, the ground of legal insufficiency is an independent and adequate state law ground foreclosing jurisdiction by this Court.

Another independent and adequate state law ground barring this Court's review is the untimeliness of the motion to disqualify. A disqualification motion is timely if filed within ten days of discovery of the facts constituting the grounds for the motion. FLA. R. JUD. ADMIN. 2.160(e), Pet. App. 7a-8a. Under Florida law, movants waive any disqualification claim which is not timely filed. *See Steinhorst v. State*, 636 So. 2d 498, 500-501 (Fla. 1994); *Guzman & Co. v. British Realty & Mortgage Corp.*, 699 So. 2d 842 (Fla. 3d DCA 1997); FLA. R. JUD. ADMIN. 2.160(e). Where a disqualification claim is waived because of tardy filing a Florida court does not even reach a movant's merits argument. *See Steinhorst v. State*, 695 So. 2d 1245, 1249 (Fla. 1997) (J. Kogan, dissenting), *cert. denied*, 522 U.S. 1022 (1998); *see also Bolling v. Lersner*, 91 U.S. 594, 595 (1876) (an untimely objection to judicial authority is an independent and adequate state law ground barring Supreme Court review).

Waiver in Florida takes place where information regarding the judge's potential conflict was reasonably

available and a litigant fails to timely move for recusal. *See Steinhorst v. State*, 636 So. 2d 498, 500 (Fla. 1994). When information about a judge appears in a newspaper, the Florida Supreme Court deems a litigant moving for judicial disqualification to be on notice of it on or around the date of publication. *See Rivera v. State*, 717 So. 2d 477, 481 n.3 (Fla. 1998) (statement made by judge to newspaper five months before trial which resulted in conviction was forever waived as ground for disqualification of judge as defendant failed to timely seek disqualification). The news articles claiming that the judge may be a former smoker were published in Reuters, with national circulation, and in the Fort Lauderdale and Palm Beach editions of a Fort Lauderdale newspaper, the Sun Sentinel in June 1997, July 1998 and June 1999. Petitioners' Motion to Disqualify, Exhs. C-I. The Sun Sentinel is sold throughout South Florida, including Miami-Dade County and in newspaper dispensers in front of the Miami-Dade County Circuit Courthouse.[6] Therefore, petitioners' motion, filed

---

[6] The record reflects that petitioners follow the news carefully, as demonstrated by the tobacco defendants' motion for mistrial that was filed following the verdict in Phase I. In support of their motion, the tobacco defendants compiled every news article that appeared in the United States plus all local, state and national television newscasts that cover the verdict of July 7, 1999. It defies credulity that an industry that tracks, collects, collates and studies their opponents and presiding judges would learn for the first time on July 22, 1999 (and purely by inadvertence), that newspaper articles appearing two years earlier referred to Judge Kaye as a possible former smoker. Nor did any of the affidavits or moving papers affirmatively establish that the media departments of the tobacco company defendants did not possess the news articles in question prior to July 22, 1999. *See* Motion to Disqualify.

approximately two months after petitioners learned on June 1, 1999 of the judge's angioplasty, Motion to Disqualify, Exh. J, and years after the publication of the first news story alleging that the Judge may be a former smoker, is untimely and petitioners have waived their claim. The admixture of old news and a June 1 angioplasty did not make the August 2 motion to disqualify timely.

Waiver is also found where a motion for recusal is delayed until after the moving party has suffered an adverse ruling unless good cause for delay is shown. *Fischer v. Knuck*, 497 So. 2d 240, 243 (Fla. 1986). Here, petitioners waited until after the jury verdict in Phase I of this trial on July 7, 1999 and after post-trial judgments were ruled upon unfavorably to them before pressing their disqualification claim and have showed no good cause for delay.

The state appellate decision is a plainly correct application of settled Florida law. In Florida, a trial judge ruling on a motion for disqualification where the issue of bias has been raised is permitted only to rule on the legal sufficiency of the motion and will be automatically disqualified for refuting the movant's allegations. *See* Fla. R. Jud. Admin 2.160(f), Pet. App. 7a-8a; *Rogers v. State*, 630 So. 2d 513, 515-16 (Fla. 1993) ("When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification."), *quoting Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978). Where a motion and its supporting materials alleged statements made about the conduct of a

presiding judge, the timing, circumstances and sources must be identified, or the motion will be found legally insufficient. *See Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996).

> . . . A legally sufficient motion for disqualification cannot be based upon rumors or gossip about what the trial judge allegedly said to unidentified people, at unidentified times, and under unidentified circumstances. . . .

Id. at 693.

Here, petitioners rely on statements in newspaper articles from 1997, 1998 and 1999 alleging that Judge Kaye may have been or was a former smoker for some unidentified period of time. These articles are based on rumor and gossip and fail to identify the source of that information, and provide no information as to the timing or circumstances of that conduct. As the disqualification motion relies on these articles for its claim that the trial judge is a former smoker, the motion is legally insufficient as a matter of law. *Barwick v. State*, 660 So. 2d 685 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996).

Further, petitioners go to great lengths to argue that there have been a series of favorable rulings for the class, reflecting bias on the part of the trial judge. Yet, the record will reflect that the class has received a large number of unfavorable rulings from the trial court throughout this litigation. In any event, "[t]he fact that a trial judge makes an adverse ruling is not a sufficient basis for establishing prejudice." *Barwick v. State*, 660 So. 2d 685, 692 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996); *Jackson v. State*, 599 So. 2d 103, 107 (Fla.), *cert.*

denied, *506 U.S. 1004 (1992)*; *Gilliam v. State*, 582 So. 2d 610, 611 (Fla. 1991); *Ex Parte American Steel Barrel Co.*, 230 U.S. 35, 44 (1913) (a motion for disqualification "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made"); *Liteky v. United States*, 510 U.S. 540, 127 L. Ed. 2d 474, 490 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"). Moreover, the petitioners' complaints about those rulings are subject to appellate review and are irrelevant to a decision on certiorari.

B. The Decision Below is Not a Final Decision Rendered by the Highest Florida State Court.

The decision rendered below is not a "final" judgment for purposes of this Court's jurisdiction under 28 U.S.C. § 1257. Under the finality rule, a state court decision is not final unless and until it is not subject to further review in any other state tribunal, and it must also be final as an effective determination of the litigation and not of merely intermediate steps therein. *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S. Ct. 481, 485-86 (1997), *citing Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). Petitioners' reliance on an exception to the finality rule announced in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), is misplaced. Petitioners assert this Court has jurisdiction "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. In *Jefferson*, this Court rejected the same *Cox* exception

because petitioners could seek this Court's review at the end of the state court litigation. 118 S. Ct. at 486. The same is true here.

Unlike the cases cited in *Cox* in support of the exception, no state law would prohibit a later appeal by petitioners to this Court. *See Cox Broadcasting Corp.*, 420 U.S. at 481-82. Even if a state court adheres to its earlier ruling as "law of the case," that determination would not limit this Court's ability to review the issue on final judgment. *Jefferson*, 118 S. Ct. at 486. Consequently, as the state court decision is subject to further review in a state tribunal and is not an effective determination of the litigation, the decision below is not "final" within the meaning of 28 U.S.C. § 1257.

In addition, a writ of certiorari may not issue from this Court to review a state judgment where the judgment is not that of the highest court of the state in which a decision could be had. 28 U.S.C. § 1257. Where it does not affirmatively appear from the record that a decision could not be had in the highest court of a state, this Court may not assume that the state supreme court would not have taken jurisdiction. *Mullen v. Western Union Beef Co.*, 173 U.S. 116, 123 (1899). Here, as the Florida Supreme Court may yet obtain jurisdiction of the instant cause following a judgment and decide the issue before this Court, this Court is without jurisdiction to grant petitioners' writ.

The instant case remains in trial. Upon final judgment, petitioners would have a right to appeal to the intermediate appellate court, the Third District Court of Appeal, and upon any adverse ruling, to invoke discretionary review in the highest court in Florida, the Florida

Supreme Court. *See* FLA. R. APP. P. 9.030(a)(2). If the Florida Supreme Court accepts jurisdiction, it is vested with authority to review any error asserted in the record, including the error alleged herein. FLA. R. APP. P. 9.110(h). If the Supreme Court of Florida does not accept jurisdiction, or if there is no basis for jurisdiction in that court, the petitioners could then seek review in this Court. At that time, a final judgment within the meaning of § 1257, would have been rendered.

The decision that is the subject of the instant petition is the Third District Court of Appeal's denial of a writ of prohibition from an order denying petitioners' motion to disqualify the trial judge. For purposes of its review, the Florida Supreme Court does not consider the denial of a writ of prohibition relating to an unsuccessful judicial disqualification motion as the law of the case in its Court. *See Barwick v. State*, 660 So. 2d 685, 691 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996).[7] Giving the state's highest court an opportunity to consider the issue is a compelling reason to dismiss the petition. *See California v. Rooney*, 483 U.S. 307, 314 (1987).

---

[7] Even in the Third District Court of Appeal which does deem its denials of writs of prohibitions as the law of the case, petitioners may, in their appeal to that court, seek review of the Third District's ruling under an exception to the law of the case doctrine. Where litigants believe that application of the law of the case doctrine results in a "manifest injustice," as petitioners herein allegedly maintain, they may in a state court appeal urge reconsideration of the challenged decision. *See Henry v. State*, 649 So. 2d 1361, 1364 (Fla. 1994), *cert. denied*, 516 U.S. 830 (1995); *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965).

II. THE FLORIDA STATE JUDGE'S REQUIRED SILENCE IS NOT AN ADMISSION OF CLASS MEMBERSHIP AND PREJUDICE WHERE FLORIDA LAW PROHIBITS THE JUDGE FROM REFUTING ALLEGATIONS AGAINST HIM IN RULING ON A MOTION TO DISQUALIFY.

Petitioners' entire argument before this Court rests upon a single allegation of "fact" that the trial judge, Judge Robert P. Kaye who presides over the Florida smokers' class action, is a member of the plaintiff class. To make their claim, petitioners have turned Florida law on its head and grossly distort the record.

Petitioners falsely allege as "fact" that Judge Kaye is a member of the plaintiff class, which consists of "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA), *rev. denied*, 682 So. 2d 1100 (Fla. 1996). Petitioners' sole support for their allegation that Judge Kaye is a member of the plaintiff class is their claim that the judge's silence and his denial of their disqualification motion as legally insufficient concedes the truth of their allegation. Pet. 6-7. Petitioners rest their claim on dictum from a stale 1968 intermediate appellate court opinion, *Hooks v. State*, 207 So. 2d 459, 464-65 (Fla. 2d DCA 1968), *id.*, which is no longer good Florida law. *Hooks* concerned the proper procedure in 1967, under then governing statutes for a trial judge to follow in a judicial disqualification matter. Subsequently, the Florida Supreme Court adopted procedural rules to govern disqualification cases and has repeatedly held

that while the relevant statutes give litigants the substantive rights to seek disqualification, the Rules that it has adopted set forth the procedure to be followed in the disqualification process. *See Rogers v. State*, 630 So. 2d 513, 515 (Fla. 1993); *The Florida Bar Re: Amendment to Florida Rules of Judicial Administration*, 609 So. 2d 465, 466 (Fla. 1992); *Brown v. St. George Island, Ltd.*, 561 So. 2d 253, 255 (Fla. 1990); *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986).

The procedural rule on judicial disqualification governing this case, Florida Rule of Judicial Administration 2.160, *see* Pet. App. 7a-8a, contains none of the procedures discussed and interpreted in *Hooks*. Therefore, *Hooks* does not apply.[8] Petitioners' contention, that in denying the disqualification motion as legally insufficient the trial judge *ipso facto* conceded the truth of petitioners' asserted "fact," is therefore unfounded. Accordingly, as a matter of law, there is no support for the underlying premise to petitioners' entire argument, that the trial judge is a member of the plaintiff class, and consequently, there is no merit to petitioners' remaining argument.

Indeed, the governing procedural rule proves the converse of petitioners' claim. A judge to whom a motion to disqualify is directed, on grounds at least in part based on bias, as here, "shall determine only the legal sufficiency of the motion and shall not pass on the truth of the

---

[8] Nor, it must be noted, was the dictum cited by petitioners in *Hooks* ever followed by another Florida court. Further, even if *Hooks* were applicable, the facts in that case are wholly distinguishable from the instant case. In *Hooks*, the litigant stated that the judge was a material witness in the case and issued a subpoena for him.

facts alleged. . . . No other reason for denial shall be stated, and an order of denial shall not take issue with the motion." FLA. R. JUD. ADMIN. 2.160(f), Pet. App. 7a-8a. When a judge attempts to refute the charges, the judge has exceeded the proper scope of judicial inquiry on a disqualification motion and, on that basis alone, has established grounds for disqualification even when otherwise unwarranted. *See Rogers v. State*, 630 So. 2d 513, 515-16 (Fla. 1993).

Here, petitioners moved for disqualification in the trial court on two grounds: the purported bias and the purported interest of the judge in the outcome of the case. The chief ground asserted, however, for the judge's bias was the judge's interest:

> As a class member according to plaintiffs [theory of the case], Judge Kaye cannot help but be biased or prejudiced in favor of the plaintiffs because his direct interests are aligned with them. Even if Judge Kaye were not a class member, he may have a claim against one or more of the defendants for the same conduct that is currently being tried before him, and therefore, cannot sit in judgment over defendants.

Motion to Disqualify at 10.

Because the basis of petitioners' bias motion is the judge's alleged interest in the case and the two issues are clearly intertwined, the judge properly responded only to

the legal sufficiency of their claims in accordance with Florida Rule of Judicial Administration 2.160(f).[9]

Accordingly, the trial judge was prohibited from responding to the allegations of petitioners. Had Judge Kaye declared that he is not a class member and has no financial interest in the case he would have been automatically disqualified under Florida law since he would be improperly passing on the truth of the allegations of the disqualification motion. Of course, that is precisely why the tobacco companies filed their motion to disqualify – to place Judge Kaye in a "Catch-22" dilemma.[10]

Petitioners further contend that Judge Kaye failed to follow proper judicial disqualification procedure by failing to enter an order declaring himself qualified and by failing to file a sworn statement that the grounds for the motion are untrue. Pet. 6. Yet, as stated above, Florida Rules of Judicial Administration 2.160, rather than the statute offered by the petitioners governs judicial qualification procedure. *The Florida Bar Re: Amendment to Florida Rules of Judicial Administration*, 609 So. 2d 465, 466 (Fla. 1992) (Florida Rule of Judicial Administration 2.160 "establishes the process for disqualification in all trial court proceedings"). The Florida Supreme Court has

---

[9] In contrast, *Douglass v. Douglas*, 633 So. 2d 1166 (Fla. 1st DCA 1994), was premised on distinct factual allegations; the claim of bias was not predicated on the judge's alleged family relationship. *See also In re: Amendments to Rules of Civil Procedure*, 458 So. 2d 245, 247 (Fla. 1984).

[10] The Florida rule of appellate procedure governing petitions for writs of prohibition provides that the absence of a response by the judge or lower tribunal is not deemed to admit the allegations of the petition. *See* FLA. R. APP. P. 9.100(e)(3).

specifically held that the statutory requirement that the judge file a sworn statement, *see* Fla. Stat. § 38.04, is constitutionally invalid. *In re: Amendments to Rules of Civil Procedure*, 458 So. 2d 245, 247 (Fla. 1984). *See* FLA. R. APP. P. 9.100(e)(3). Accordingly, petitioners' argument that the trial judge failed to follow proper disqualification procedure is erroneous as a matter of law.

CONCLUSION

The motion to disqualify and petition for writ of prohibition were legally insufficient and untimely and were properly denied under Florida law. This petition is premised upon the erroneous assumption that the state court trial judge is a member of the plaintiff class of injured smokers. There is no record support for that erroneous premise. In view of the record in this case, and the authorities cited above, the petition should be denied.

Respectfully submitted,

STANLEY M. ROSENBLATT
(Counsel of Record)

SUSAN ROSENBLATT
SHERRIE J. COHEN

STANLEY M. ROSENBLATT, P.A.
66 West Flagler Street
12th Floor, Concord Building
Miami, Florida 33130
(305) 374-6131

Counsel for Respondents
Florida Engle Class

No. 99-1277

Supreme Court, U.S.
FILED
MAY 2 - 2000
CLERK

In the Supreme Court of the United States

PHILIP MORRIS INCORPORATED, ET AL.,
PETITIONERS

v.

HOWARD A. ENGLE, M.D., ET AL.,
RESPONDENTS[1]

On Petition for a Writ of Certiorari to the Florida District Court of Appeal for the Third District

REPLY BRIEF FOR PETITIONERS

ANDREW L. FREY
ANDREW H. SCHAPIRO
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Philip Morris Incorporated

(Additional Counsel Listed On Inside Cover)

20 pp

RICHARD A. SCHNEIDER
PAUL D. CLEMENT
King & Spalding
191 Peachtree Street
Atlanta, GA 30303
(404) 572-4600

Counsel for Brown & Williamson Tobacco Corp. (for itself and as successor to The American Tobacco Co.)

ARTHUR J. ENGLAND, JR.
DAVID L. ROSS
Greenberg Traurig
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500

JAMES T. NEWSOM
Shook, Hardy & Bacon
One Kansas City Place
1230 Main Street
Kansas City, MO 64105
(816) 474-6500

Counsel for Lorillard, Inc./ Lorillard Tobacco Co.

ROBERT F. MCDERMOTT, JR.
ROBERT H. KLONOFF
GREGORY G. KATSAS
Jones, Day, Reavis & Pogue
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

WENDY F. LUMISH
Carlton Fields
100 S.E. 2nd Street
Miami, FL 33131
(305) 530-0050

Counsel for R.J. Reynolds Tobacco Co.

JOSEPH P. MOODHE
Debevoise & Plimpton
875 Third Avenue
New York, NY 10022
(212) 909-6000

Counsel for the Council for Tobacco Research — USA, Inc.

JOSE E. MARTINEZ
Martinez & Gutierrez
601 Brickell Key Drive
Miami, FL 33131
(305) 577-4500

Counsel for Tobacco Institute

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

1. Final Judgment from the Highest State Court in Which Review Could Be Had 1

2. "Adequate and Independent State Grounds" 3

   a. "Rumor and Gossip" 5

   b. Timeliness 6

3. There Is No "Catch-22" 8

TABLE OF AUTHORITIES

Page(s)

Cases

Arizona v. *Evans*, 514 U.S. 1 (1995) 3, 5

Bandini Petroleum Co. v. *Superior Court*, 284 U.S. 8 (1931) 2

Barnett v. *Barnett*, 727 So. 2d 311 (Fla. Dist. Ct. App. 1999) 6

Barr v. *City of Columbia*, 378 U.S. 146 (1964) 7

Barwick v. *State*, 660 So. 2d 685 (Fla. 1995) 5, 6, 9

Board of Educ. v. *Superior Court*, 448 U.S. 1343 (1980) 2

Brake v. *Murphy*, 693 So. 2d 663 (Fla. Dist. Ct. App. 1997) 6, 7

Coleman v. *Thompson*, 501 U.S. 722 (1991) 5

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) ... 1

Douglass v. *Douglas*, 633 So. 2d 1166 (Fla. Dist. Ct. App. 1994) 9

Dragovich v. *State*, 492 So. 2d 350 (Fla. 1986) 9

Fischer v. *Knuck*, 497 So. 2d 240 (Fla. 1986) 9

Fisher v. *District Court*, 424 U.S. 382 (1976) 2

Harris v. *Reed*, 489 U.S. 255 (1989) 3, 5

Hathorn v. *Lovorn*, 457 U.S. 255 (1982) 7

Hooks v. *State*, 207 So. 2d 459 (Fla. Dist. Ct. App. 1968) 8, 9

In re Amendments, 458 So. 2d 245 (Fla. 1984) 8

TABLE OF AUTHORITIES — Continued

Page(s)

In re Frank, 2000 WL 183512 (Fla. Feb. 17, 2000) 5, 10

Jenkins v. *Florida*, 385 So. 2d 1356 (Fla. 1980) 2

Klapper-Barrett v. *Nurell*, 742 So. 2d 851 (Fla. Dist. Ct. App. 1999) 8

Madruga v. *Superior Court*, 346 U.S. 556 (1954) 2

Michigan Central R.R. v. *Mix*, 278 U.S. 492 (1929) 2

Michigan v. *Long*, 463 U.S. 1032 (1983) 3, 5

Minnesota v. *National Tea Co.*, 309 U.S. 551 (1940) 3

Missouri ex rel. St. Louis, B. & M. Ry. v. *Taylor*, 266 U.S. 200 (1924) 2

Mt. Vernon-Woodberry Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U.S. 30 (1916) 2

Nash v. *Florida Indus. Comm'n*, 389 U.S. 235 (1967) 3

New York v. *Class*, 475 U.S. 106 (1986) 3

Nordqvist v. *Nordqvist*, 586 So. 2d 1282 (Fla. Dist. Ct. App. 1991) 1

Palmore v. *Sidoti*, 466 U.S. 429 (1984) 3

Pardo v. *State*, 596 So. 2d 665 (Fla. 1992) 9

Pistorino v. *Ferguson*, 386 So. 2d 65 (Fla. Dist. Ct. App. 1980) 8

Rivera v. *State*, 717 So. 2d 477 (Fla. 1998) 7

TABLE OF AUTHORITIES — Continued

Page(s)

Robbins v. *Robbins*, 742 So. 2d 395 (Fla. Dist. Ct. App. 1999) 6, 7

Rogers v. *State*, 630 So. 2d 513 (Fla. 1993) 9

St. George Island, Ltd. v. *Rudd*, 547 So. 2d 961 (Fla. Dist. Ct. App. 1989) 9

State ex rel. Cannon v. *Churchwell*, 195 So. 2d 599 (Fla. Dist. Ct. App. 1967) 9

Steinhorst v. *State*, 636 So. 2d 498 (Fla. 1994) 7

Suarez v. *Dugger*, 527 So. 2d 190 (Fla. 1988) 5, 6

Ylst v. *Nunnemaker*, 501 U.S. 797 (1991) 5

Statutes

28 U.S.C. § 1257 ..... 1, 2

FLA. CONST. art. V, § 4(b)(3) 1

FLA. CONST. art. V, § 3 2

FLA. STAT. § 38.02 ..... 5, 8, 9

FLA. STAT. § 38.04 8

FLA. STAT. § 38.10 ..... 5, 8, 9

FLA. R. APP. P. 9.030(b)(3) 1

FLA. R. APP. P. 9.100 1

FLA. R. APP. P. 9.100(e)(3) 9

FLA. R. CRIM. P. 3.850 7

TABLE OF AUTHORITIES — Continued

Page(s)

FLA. R. JUD. ADMIN. 2.160 ..... 6, 7

FLA. R. JUD. ADMIN. 2.160(f) 9

Miscellaneous

R. STERN ET AL., SUPREME COURT PRACTICE (7th ed. 1993) 2

REPLY BRIEF FOR PETITIONERS

It is difficult to imagine a more clear-cut violation of the Due Process Clause than a trial presided over by a judge with a significant interest in the outcome. Yet respondents do not dispute that Judge Kaye, a resident of Florida, is a former smoker who suffers from heart disease; thus, under their own definition, he is a member of the certified plaintiff class. Respondents also do not deny that allowing a member of the plaintiff class to preside over a class action is a grievous violation of due process. Instead, respondents conjure up a variety of procedural objections to the petition. They contend that there is no final judgment for this Court to review; that the decision below rests on adequate state grounds; and that, because of a "Catch-22" inherent in Florida law, the trial judge was disabled from responding to the allegations of interest. Each of these contentions is frivolous.

1. *Final Judgment from the Highest State Court in Which Review Could Be Had.* Respondents assert (Br. in Opp. 23-24) that the judgment below is not final under 28 U.S.C. § 1257, because review can be sought at the end of the state court litigation. Respondents are incorrect.

Petitioners have no right under Florida law to litigate the federal issue presented here in any subsequent appeal. Under Florida law, the denial of a petition for prohibition is a ruling on the merits that precludes the appellate court from reconsidering the same claim on appeal. See *Nordqvist* v. *Nordqvist*, 586 So. 2d 1282, 1283 (Fla. Dist. Ct. App. 1991). Accordingly, this is a case "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975).

In any event, review is proper under the alternative jurisdictional ground presented in the petition (at 1-2) — which respondents fail to address. A petition for prohibition is an original action under Florida law. See FLA. CONST. art. V, § 4(b)(3); FLA. R. APP. P. 9.030(b)(3), 9.100. It has long been

settled that "[p]rohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code * * *." *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916); see also *Missouri ex rel. St. Louis, B. & M. Ry.* v. *Taylor*, 266 U.S. 200, 206 (1924) ("The application for a writ of prohibition is an independent adversary suit which was finally determined by the judgment under review."); *Michigan Central R.R.* v. *Mix*, 278 U.S. 492, 494 (1929) (state supreme court's unexplained denial of defendant's application for a writ of prohibition "is final within the meaning of § 237a of the Judicial Code"); *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931) ("The proceeding for a writ of prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of § 237(a) of the Judicial Code."); *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257 * * *."); *Fisher* v. *District Court,* 424 U.S. 382, 385 n.7 (1976) ("A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court," is a final judgment within the meaning of 28 U.S.C. § 1257); *Board of Educ.* v. *Superior Court,* 448 U.S. 1343, 1345-1346 (1980) (Rehnquist, J., in chambers) (same); R. STERN ET AL., SUPREME COURT PRACTICE 108 (7th ed. 1993).

Respondents also contend that the District Court of Appeal's decision does not constitute action by the highest court from which review could be had. Respondents again are mistaken. As noted in the petition (at 1), the Florida Supreme Court had no jurisdiction to review the denial of the application for a writ of prohibition, because the District Court of Appeal denied the petition without opinion and did not certify a question to the higher court. See FLA. CONST. art. V, § 3; *Jenkins* v. *Florida*, 385 So. 2d 1356, 1359 (Fla. 1980). This

Court has recognized that under such circumstances the District Court of Appeal is the highest court of Florida in which a decision could be had. See, *e.g.*, *Palmore* v. *Sidoti*, 466 U.S. 429, 430 (1984); *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967).

2. *"Adequate and Independent State Grounds."* Respondents insist that this Court lacks jurisdiction because the decision below rests on two state-law grounds: (a) petitioners' supposed reliance on "rumor and gossip from unidentified people, at unidentified times, and under unidentified circumstances," and (b) the alleged untimeliness of the motion to disqualify the trial judge. Br. in Opp. 12, 14-21. There is no basis for concluding that the decision below was based on either rationale.

To begin with, this Court has held that "'ambiguous or obscure adjudications by state courts do not stand as barriers'" to the Court's review of federal constitutional questions. *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983) (quoting *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940)); accord *Arizona* v. *Evans*, 514 U.S. 1, 9 (1995). Accordingly, where "a state court decision fairly appears to rest primarily on federal law * * * [and] the adequacy and independence of any possible state law ground is not clear from the face of the opinion," this Court assumes that it is based on *federal* law. *Long*, 463 U.S. at 1040-1041; see also, *e.g.*, *Harris* v. *Reed*, 489 U.S. 255, 260-263 (1989); *New York* v. *Class*, 475 U.S. 106, 109-110 (1986).[1]

Here, there is not even any ambiguity: the record shows

---

[1] Respondents assert, in reliance on a handful of old cases, that this Court lacks jurisdiction whenever the judgment *might* have rested on a nonfederal ground. See Br. in Opp. 15. The holdings of those cases were overruled by *Michigan* v. *Long*. See 463 U.S. at 1038, 1042; see also *id.* at 1066-1067 (Stevens, J., dissenting).

that the decision below rests on federal law.

First, in moving to disqualify Judge Kaye, petitioners relied unambiguously on the Due Process Clause of the United States Constitution. Motion to Disqualify at 8, *Engle* v. *R.J. Reynolds Tobacco Co.* (Fla. Circ. Ct. filed Aug. 2, 1999) (No. 94-08273 CA 22). Petitioners renewed this argument in their Petition for Writ of Prohibition to the Third District Court of Appeal, asserting that "[t]he United States Supreme Court has held unequivocally that the Constitutional guarantee of due process of law demands that a judge not sit in a case in which he has a financial interest." Petition for Writ of Prohibition at 18, *Philip Morris Inc.* v. *Engle* (Fla. Dist. Ct. App. filed Aug. 12, 1999) (No. 99-02080); see also *id.* at 18-20, 24-28 (discussing federal and state precedent).

Second, respondents did not contend below that state law barred the relief that petitioners sought. Indeed, respondents did not respond to petitioners' motion or petition on the merits at all, much less put forth state grounds for denial.[2]

Third, the summary denials of petitioners' motion and petition contain no rationale, much less a plain statement that the decisions were based on state law. The trial court ordered that petitioners' motion to disqualify was "DENIED as being legally insufficient," Pet. App. 2a, while the appellate court's order stated in its entirety that "[f]ollowing review of this petition for writ of prohibition, it is ordered that said petition is hereby denied." *Id.* at 1a. Under these circumstances, the only proper inference is that the decision below was a rejection of petitioners' federal due process claim, not a finding of some procedural obstacle never even mentioned by the parties or the

---

[2] Respondents' only response to petitioners' filings expressly declined to address the propriety of disqualification. Engle Florida Class Response and Opposition to Petitioners' Second Motion to Supplement Record at 5, *Philip Morris, Inc.* v. *Engle* (Fla. Dist. Ct. App. filed Nov. 4, 1999) (No. 99-0280).

courts. See *Harris*, 489 U.S. at 266; see also *Evans*, 514 U.S. at 9-10; *Long*, 463 U.S. at 1043-1044. Cf. *Ylst* v. *Nunnemaker*, 501 U.S. 797, 805-806 (1991); *Coleman* v. *Thompson*, 501 U.S. 722, 740 (1991).

Even if the court below had been aware of the state law grounds now asserted for the first time by respondents, it could not have premised its decision on those grounds, because they are plainly inapplicable to this situation.

a. *"Rumor and Gossip."* Relying on *Barwick* v. *State*, 660 So. 2d 685 (Fla. 1995), respondents contend that the recusal motion was properly denied as based on "rumor and gossip." See Br. in Opp. 12, 13, 18, 21, 24. But *Barwick* (a case never cited below) dealt with disqualification for *fear of bias*, under Fla. Stat. § 38.10. Petitioners' due process claim, on the other hand, is based on the denial of their motion for disqualification for *conflict of interest* under Fla. Stat. § 38.02.

The distinction between the two statutes is critical: § 38.10, by its terms, looks only to whether the facts alleged by the movant would cause a reasonable person to fear that the judge is biased against him. If so, under Florida law, the judge must recuse himself, without addressing the truth or falsity of the movant's allegations. See *Suarez* v. *Dugger*, 527 So. 2d 190, 191 (Fla. 1988) ("It is not a question of how the judge feels; it is a question of what feeling resides in the [movant]'s mind and the basis for such feeling.") (internal quotation marks omitted) (*per curiam*). *Barwick* held only that the "rumor and gossip" at issue in that case were insufficient as a matter of law to cause a reasonable person to fear bias under § 38.10. By contrast, where a disqualifying *conflict of interest* under § 38.02 is alleged, the truth or falsity of the allegations *must* be explored, and a judge cannot prevent a litigant (or reviewing court) from assessing the claim simply by remaining silent based on an unexpressed belief that the source of the allegation of interest is insufficiently credible. See *In re Frank*, 2000 WL 183512, at

*4-*5 (Fla. Feb. 17, 2000). Respondents are unable to cite any case in which a claim of interest under § 38.02 was rejected because the allegation of interest was based on "rumor" or "gossip."

In any event, even if the *Barwick* standard were applicable here, petitioners' allegations plainly satisfied it. Petitioners' contention that Judge Kaye is a member of the plaintiff class was based not on rumor and gossip from unidentified sources but on statements (which respondents *do not dispute*) of the judge himself and the judge's own clerk, as well as numerous newspaper articles. See Pet. 6. It is hard to imagine what more a litigant in this situation could be expected to produce, at least to be entitled to a hearing on the merits. See *Barnett* v. *Barnett*, 727 So. 2d 311, 312 n.2 (Fla. Dist. Ct. App. 1999) ("There is no requirement that the party have personal knowledge of the facts alleged [in a disqualification motion] nor that the motion be accompanied by sworn affidavits of persons with such knowledge."); *Robbins* v. *Robbins*, 742 So. 2d 395, 397 (Fla. Dist. Ct. App. 1999) (hearsay allegation is cognizable in disqualification motion and may itself constitute legally sufficient grounds for recusal); see also *Suarez*, 527 So. 2d at 191 (allegations based on statements attributed to judge in newspaper article warranted recusal). In these circumstances, it is absurd to suppose that an inapposite rule from the uncited *Barwick* case was the basis of the unexplained decision below.

b. *Timeliness*. Respondents contend (Br. in Opp. 18-19) that the motion to disqualify was untimely because it was based, in part, on articles published several months or years before the motion was filed. But the time period for filing a motion to disqualify runs from actual, not constructive, notice of the relevant facts. See FLA. R. JUD. ADMIN. 2.160 (motion to disqualify must be made within "10 days after discovery of the facts constituting the grounds for the motion"); *Brake* v. *Murphy*, 693 So. 2d 663, 665 (Fla. Dist. Ct. App. 1997) (interpreting rule to

require *actual knowledge*).[3]

In support of their motion to disqualify and their petition for a writ of prohibition, petitioners submitted the sworn affidavits of nine attorneys for petitioners, who stated under oath that they and their clients were unaware that Judge Kaye was a former smoker with heart disease prior to July 22, 1999. Neither respondents nor the courts below disputed the veracity of this sworn testimony.[4] That evidence conclusively establishes the timeliness of petitioners' motion for disqualification. See *Robbins* v. *Robbins*, *supra*.[5]

---

[3] Respondents' reliance on *Rivera* v. *State*, 717 So. 2d 477 (Fla. 1998), and *Steinhorst* v. *State*, 636 So. 2d 498 (Fla. 1994), is misplaced. *Steinhorst* involved a motion to vacate a criminal conviction under Florida Rule of Criminal Procedure 3.850, which requires the motion to be filed within two years of final judgment unless "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." This case, in contrast, involved a disqualification request under Rule 2.160, which does not impose a constructive notice rule. *Rivera* does not address the question whether constructive notice is sufficient to start the time period for a motion to disqualify, because the defendant apparently did not allege that he was unaware of the newspaper interview underlying his motion at the time it was published.

[4] Respondents speculate that petitioners must have had prior notice of newspaper articles reporting that Judge Kaye is a "possible former smoker" because they "follow the news carefully." Br. in Opp. 19 n.6. The claim is legally irrelevant: *Brake* v. *Murphy*, *supra*, holds that receipt of documents showing a disqualifying conflict does not trigger the filing deadline if the party is unaware of the legal significance of the documents.

[5] Even if petitioners' motion were not timely, their failure to comply with the time deadline would not bar this Court's review. A state procedural rule is not an "adequate" state ground "unless the procedural rule is 'strictly * * * followed.'" *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982) (quoting *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964)). As the Florida courts themselves have acknowledged, failure to comply with the time limit for a disqualification motion will be disregarded if the case involves "patent

In sum, there is no basis to assume that the denial of the recusal motion as "legally insufficient" (Pet. App. 2a) was anything other than what it purported to be — a ruling on the merits of petitioners' federal due process claim. Respondents' belated effort to introduce state law procedural obstacles without support in the record or in Florida law is a pure invention designed to avoid this Court's review.

3. *There Is No "Catch-22."* Respondents' final argument (Br. in Opp. 25-29) that, because of petitioners' § 38.10 motion for recusal based on *fear of bias*, Judge Kaye was disabled by state law from responding to the allegations in the § 38.02 motion for recusal based on *actual interest*, is complete nonsense. Under Florida law, if a trial judge is alleged to have a disqualifying interest under § 38.02, he *must* address the factual allegations on the merits. If the judge does not expressly state that the allegations are false, they are taken as true, and the only issue is whether the facts constitute a disqualifying interest as a matter of law. See *Hooks* v. *State*, 207 So. 2d 459, 464 (Fla. Dist. Ct. App. 1968).[6]

None of the statutes, rules or cases cited by respondents supports the argument that Judge Kaye was legally precluded from confirming or denying that he is a former smoker with heart disease. None of the authorities cited by respondents even

---

prejudice." *Pistorino* v. *Ferguson*, 386 So. 2d 65, 66 (Fla. Dist. Ct. App. 1980) (collecting cases); see also, *e.g.*, *Klapper-Barrett* v. *Nurell*, 742 So. 2d 851, 852 (Fla. Dist. Ct. App. 1999). It is difficult to imagine more patent prejudice than the trial judge's own substantial interest, as a class member, in the outcome of the case.

[6] Contrary to respondents' assertion (Br. in Opp. 28-29), the Florida Supreme Court's invalidation of the sworn-statement requirement of Section 38.04, *In re Amendments*, 458 So. 2d 245 (Fla. 1984), does not prevent a trial judge from addressing allegations that he has a disqualifying interest. It simply means that the judge is not required to submit a sworn affidavit in doing so.

relates to disqualification for *actual interest* (§ 38.02); instead, each relates to disqualification based on *fear of bias* (§ 38.10). For example, Rule 2.160(f), which provides that the judge should rule only on legal sufficiency and not address the underlying factual allegations, applies by its terms *only* to disqualification based on fear of bias. Similarly, the cases on which respondents rely — *Barwick* v. *State*, *supra*; *Rogers* v. *State*, 630 So. 2d 513 (Fla. 1993); *Fischer* v. *Knuck*, 497 So. 2d 240 (Fla. 1986); and *Dragovich* v. *State*, 492 So. 2d 350 (Fla. 1986) — involve only disqualification for fear of bias.

Not surprisingly, the sole case to address the situation confronting a judge faced with pending motions for disqualification based on both actual interest and fear of bias, *Douglass* v. *Douglas*, 633 So. 2d 1166, 1167 (Fla. Dist. Ct. App. 1994), unequivocally provides that it is proper for the judge to address the factual allegations underlying the claim of interest.[7]

Finally, a moment's reflection shows that respondents' position could not possibly be the law of Florida or any other state. On respondents' theory, any trial judge who has a financial interest in a case can avoid disqualification, and thereby deprive a litigant of due process, simply by refusing to address the factual allegations in the recusal motion. (And, on respondents' theory, an appellate court would have to assume that the allegations are false.) As noted above, Florida law avoids that nonsensical result. See *Hooks*, 207 So.2d at 464.[8]

---

[7] For other cases noting or discussing the differences between § 38.02 and § 38.10, see, *e.g.*, *St. George Island, Ltd.* v. *Rudd*, 547 So. 2d 961, 962 (Fla. Dist. Ct. App. 1989); *State ex rel. Cannon* v. *Churchwell*, 195 So. 2d 599 (Fla. Dist. Ct. App. 1967).

[8] Contrary to respondents' suggestions (Br. in Opp. 25-26), *Hooks* has not been overruled, disapproved, or limited, remains the law of Florida, and was binding on Judge Kaye. See *Pardo* v. *State*, 596 So. 2d 665, 666 (Fla. 1992). As noted above, Rule 2.160(f) does not apply to accusations of interest. By the same token, Rule 9.100(e)(3) relates entirely to whether a trial judge

Respondents' "Catch-22" argument should thus be dismissed as a complete contrivance. There is no serious argument that Judge Kaye was legally prohibited from refuting the allegations about his smoking and medical history — if, in fact, they were false.[9]

4. What is left, then, is a straightforward and disturbing scenario. A case in which hundreds of billions of dollars are on the line is being adjudicated by a trial judge who is a member of the plaintiff class. The highest Florida court in which review can be sought has approved a determination that petitioners' due process objection to this state of affairs is "legally insufficient." And respondents do not even deign to dispute the due process issue on the merits. The constitutional violation and the importance of the issue are plain. Only this Court can provide relief.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, and the decision below summarily reversed.

---

must file a *formal written response to a petition for a writ of prohibition*, not to whether he should address factual allegations when he disposes of a motion to disqualify himself based on his interest in the case.

[9] Respondents' argument is particularly unwarranted given that, as the Florida Supreme Court has recently reaffirmed, Judge Kaye had an obligation to disclose any potential conflicts of interest in the case *sua sponte* even if they were not legally sufficient grounds for disqualification. See *In re Frank*, 2000 WL 183512, at *10 (Fla. Feb. 17, 2000). Obviously, Judge Kaye was aware of his disqualifying interest at all times, yet he failed to make the necessary disclosures.

ANDREW L. FREY
ANDREW H. SCHAPIRO
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Philip Morris Incorporated

MAY 2000

RICHARD A. SCHNEIDER
PAUL D. CLEMENT
King & Spalding
191 Peachtree Street
Atlanta, GA 30303
(404) 572-4600

Counsel for Brown & Williamson Tobacco Corp.
(for itself and as successor to The American Tobacco Co.)

ARTHUR J. ENGLAND, JR.
DAVID L. ROSS
Greenberg Traurig
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500

JAMES T. NEWSOM
Shook, Hardy & Bacon
One Kansas City Place
1230 Main Street
Kansas City, MO 64105
(816) 474-6500

Counsel for Lorillard, Inc./Lorillard Tobacco Co.

ROBERT F. MCDERMOTT, JR.
ROBERT H. KLONOFF
GREGORY G. KATSAS
Jones, Day, Reavis
& Pogue
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

WENDY F. LUMISH
Carlton Fields
100 S.E. 2nd Street
Miami, FL 33131
(305) 530-0050

Counsel for R.J. Reynolds Tobacco Co.

JOSEPH P. MOODHE
Debevoise & Plimpton
875 Third Avenue
New York, NY 10022
(212) 909-6000

Counsel for the Council for Tobacco Research — USA, Inc.

JOSE E. MARTINEZ
Martinez & Gutierrez
601 Brickell Key Drive
Miami, FL 33131
(305) 577-4500

Counsel for Tobacco Institute

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 99-1277

Supreme Court, U.S.
FILED
MAR 10 2000
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1999

PHILIP MORRIS, INCORPORATED, ET AL.,

Petitioners,

v.

HOWARD A. ENGLE, M.D., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal for the Third District

---

RESPONDENTS' FLORIDA ENGLE CLASS OBJECTION TO MOTION OF CHAMBER OF COMMERCE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

STANLEY M. ROSENBLATT
Counsel of Record
SUSAN ROSENBLATT
Stanley M. Rosenblatt, P.A.
66 West Flagler Street
12th Floor, Concord Building
Miami, Florida 33130
(305) 374-6131

Counsel for Respondent
Florida Engle Class

TABLE OF CONTENTS

Page(s)

Table of Contents ii

Table of Authorities . . . . . iii-v

Objection to Motion of Chamber of Commerce to File Brief *Amicus Curiae* in Support of Petitioners 1-11

A. The Proposed Partisan *Amicus* Brief Should Be Excluded Where the Petitioner Tobacco Companies Are Members of the *Amicus* Chamber of Commerce and Provide Financial Support to the Chamber 1-3

B. The Proposed *Amicus* Brief of The Chamber of Commerce Should Be Denied Where It Contains a Highly Partisan Presentation of Facts That Are Unsupported by the Record and It Is Duplicative of the Petition for A Writ of Certiorari Filed By The Chamber's Member Tobacco Companies 3-10

Conclusion 11

INDEX TO APPENDICES

TAB

Order of the Supreme Court of Florida in Case No. 96,862 *R.J. Reynolds Tobacco Company, et al., Petitioners v. Howard A. Engle, M.D., et al., Respondents*, December 8, 1999, Denying *Motion for Leave to File Brief of Amicus Curiae in Support of Petitioners* filed By the Chamber of Commerce of the United States 1

Industry Ad Campaign Helps Stall Tobacco Bill, *New York Times*, May 22, 1998 2

Excerpts from the Website of the United States Chamber of Commerce at www.chamber.org 3

STANLEY M. ROSENBLATT, P.A.

CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

TABLE OF AUTHORITIES

CASES **Page(s)**

Barwick v. State,
660 So. 2d 685 (Fla. 1995)
cert. denied, 133 L. Ed. 2d 766 (1996) 4

Broin v. Philip Morris Companies, et al.,
641 So. 2d 888 (Fla. 3d DCA 1994),
rev. denied, 654 So. 2d 919 (Fla. 1995) 5

Dragovich v. State,
492 So. 2d 350 (Fla. 1986) 4

Fischer v. Knuck,
497 So. 2d 240 (Fla. 1986) 4

Guzman & Co. v. British Realty & Mortgage Corp.,
699 So. 2d 842 (Fla. 3d DCA 1997), *rev. denied*,
709 So. 2d 543 (1999) 4

Jefferson v. City of Tarrant, Ala.,
118 S. Ct. 481 (1997) 7

Liberty Lincoln Mercury v. Ford Marketing,
149 F.R.D. 65, 82-83 (D.N.J. 1993) 10

Leigh v. Engle,
535 F. Supp. 418, 420 (N.D.Ill. 1982) 10

Long v. Coast Resorts, Inc.,
49 F. Supp. 2d 1177, 1178 (D.Nev. 1999) 10

New England Patriots Football Club v. University of Colorado,
592 F. 2d 1196, 1198, n.3 (1st Cir. 1979) 7

Rivera v. State,
717 So. 2d 477, 481 (Fla. 1998) 4

Rogers v. State,
630 So. 2d 513 (Fla. 1994) 4

STANLEY M. ROSENBLATT, P. A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

CASES **Page(s)**

Ryan v. Commodity Futures Trading Commission,
125 F. 3d 1062, 1063-4 (7th Cir. 1997) 6

Sony Corp. v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 7

Strasser v. Doorley,
432 F. 2d 567, 569 (1st Cir. 1970) 7, 8

United Stationers, Inc. v. United States,
982 F. Supp. 1279, 1288, n.7 (N.D.Ill. 1997)
aff'd, 163 F. 3d 440 (7th Cir. 1999) 10

United States v. Ahmed,
788 F. Supp. 196, 198 (S.D.N.Y. 1992),
aff'd, 980 F. 2d 161 (2d Cir. 1992) 10

United States v. El-Gabrowny,
844 F. Supp. 955, 958-59 (S.D.N.Y. 1994) 10

United States v. Gotti,
755 F.Supp. 1157, 1159 (E.D.N.Y. 1991) 6, 7

United States v. State of Michigan,
940 F. 2d 143, 164-65 (6th Cir. 1991),
cert. denied, 130 L. Ed. 2d 275 7

Yip v. Pagano,
606 F. Supp. 1566, 1568 (D.N.J. 1985)
aff'd, 782 F. 2d 1033 (3d Cir. 1986) 10

STANLEY M. ROSENBLATT, P. A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

RULES **Page(s)**

Supreme Court Rule 37 11

Supreme Court Rule 37.2(b) 11

Supreme Court Rule 37.6 2

Fla. R. Jud. Admin. 2.160 5

Fla. R. Jud. Admin. 2.160(e) 4

Fla. R. Jud. Admin. 2.160(f) 4

STATUTES

§38.10, Florida Statutes 4, 5

OTHER AUTHORITIES

The Analysis of the 1977 Revisions of the Supreme Court Rules in *Supreme Court Rules: The 1997 Revisions* (Robert L. Stern, et al., 1999) 2

Burns David, et al., *Cigarette Smoking Behavior in the United States, Changes in Cigarette Related Disease Risks and Their Implications for Prevention and Control, Smoking and Tobacco Control Monograph No. 8* (National Cancer Institute, Burns, David, et al., ed. 1997) 10

STANLEY M. ROSENBLATT, P.A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

OBJECTION TO MOTION OF CHAMBER OF COMMERCE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Respondents, the Florida Engle Class recognize that *amicus curiae* briefs are regularly filed before this Court. However, under the circumstances of this case, the Class suggests that leave to file the *amicus* brief of the Chamber of Commerce, should be denied.

A. The Proposed Partisan *Amicus* Brief Should Be Excluded Where the Petitioner Tobacco Companies are Members of the *Amicus* Chamber of Commerce and Provide Financial Support to the Chamber.

The Chamber of Commerce discloses at *footnote 1* of its proposed *amicus* brief:

> No counsel of any party authored any part of this brief, and no person or entity, **other than the *amicus curiae*, its members,** and its counsel, made a monetary contribution to the preparation and submission of this brief [emphasis supplied].

The Petitioner tobacco companies, Philip Morris, Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., for itself and as successor to the American Tobacco Company and Lorillard Tobacco Company/ Lorillard, Inc., are members of the Chamber of Commerce of the United States. Thus, Petitioners did provide monetary contributions toward the preparation and submission of the brief in support of themselves. At a minimum, the *amicus* Chamber of Commerce of the United States should disclose all payments paid to the Chamber by its member tobacco companies during the past several years, including any special payments or contributions in connection with this Supreme Court *amicus* submission. Supreme Court Rule 37.6 requires full disclosure from litigants as to all financial contributions provided for the preparation or submission of an *amicus*

STANLEY M. ROSENBLATT, P.A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

brief. *The Analysis of the 1977 Revisions of the Supreme Court Rules* in *Supreme Court Rules: The 1997 Revisions* (Robert L. Stern, et al., 1999) discusses Rule 37.6 and this very situation and suggests to litigants:

> . . . [I]f a party to a proceeding is also a member of an organization that is filing an *amicus* brief, should that fact be disclosed? Or if such a party makes a monetary contribution to the preparation or submission of the brief beyond that of other members of the organization, should that fact be disclosed? The Clerk's view, though not dictated by the terms of Rule 37.6, is that the prudent lawyer should disclose the facts in those two situations.

Id. at 6-7.

The extremely close alliance that exists between the *amicus* Chamber and the Petitioner tobacco companies is reflected by the joint industry advertising campaign between the tobacco industry and the United States Chamber of Commerce in May, 1998, that was aimed at defeating smoking legislation that was pending in Congress at that time. The Class previously advised the Supreme Court of Florida of the existence of the joint advertising campaign between the Chamber and the tobacco industry when the Chamber of Commerce filed a very similar motion to file a brief *amicus curiae* before the Supreme Court of Florida, on different issues. The *amicus* motion by the Chamber of Commerce was denied by the Florida Supreme Court on December 8, 1999. *See* Appendix ("App.) 1. The front page story of the *New York Times* on Friday, May 22, 1998, *Industry Ad Campaign Helps Stall Tobacco Bill*, was submitted to the Florida Supreme Court and provides in part:

> The tobacco lobby has pulled off a surprising public relations coup, and won a round on Capitol Hill today, thanks in part to the televised image of a harried, sweaty waitress with earrings the size of onion rings who leans into the camera and says: "I'm no millionaire. I work hard. Why single me out?"

STANLEY M. ROSENBLATT, P. A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-6131

> That commercial sponsored by the United States Chamber of Commerce, is part of a major advertising and lobbying campaign that has been remarkably successful in turning what tobacco opponents view as a Bill that would discourage teenage smoking into a tax issue and an assault on working stiffs who cannot afford to pay more for cigarettes.
>
> The campaign, by the tobacco industry and its allies, includes the purchase of television time in at least fifty major media markets, and lobbyists on both sides say it was a big factor in the decision today to postpone a Senate vote on the Bill until after Congress returns next month from recess. . . . (emphasis supplied).

See App. 2.

The United States Chamber of Commerce website is replete with its partisan position in favor of its member tobacco companies; the Chamber opposes all state and federal litigation against tobacco companies. Examples of publication by the *amicus* Chamber on tobacco issues has been included in the Appendix. *See* App. 3.

B. The Proposed *Amicus* Brief of The Chamber of Commerce Should Be Excluded Where it Contains a Highly Partisan Presentation of Facts that are Unsupported by the Record and it is Duplicative of the Petition for a Writ of Certiorari Filed by the Chamber's Member Tobacco Companies.

The *amicus* brief presents a complete distortion of the factual record, below. The *amicus* brief is merely a duplication of the tobacco industry's petition for a writ of certiorari and presents a partisan view of the facts that are without support in the record. The Petitioners and *amicus* suggest to this Court that the state courts in Florida have permitted a class member to preside over a statewide class action. However anxious and desperate the Petitioners and the *amicus* may be to capture the interest of this Court to obtain review, the proposed *amicus* brief crosses over all lines of advocacy; there is no excuse for such a distorted and partisan presentation.

STANLEY M. ROSENBLATT, P.A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

While the role of an *amicus* may have shifted slightly over the years from that of a totally disinterested "friend of the Court", the role has not changed that dramatically that an *amicus* brief may now present a partisan distortion of the facts to assist its member companies. What is so objectionable in the *amicus* brief, and reason alone for excluding same, is that there exists no semblance of neutrality or objectivity.

Judge Robert P. Kaye who presides over the Engle class action is not a class member. Judge Kaye has never been a class member. Florida law prohibits a presiding judge from challenging or passing on the truth of allegations contained within a motion for recusal or disqualification that is filed under Fla. R. Jud. Admin. 2.160(f) and Section 38.10, Florida Statutes. *See Barwick v. State*, 660 So. 2d 685 (Fla. 1995), *cert. denied* 133 L. Ed. 2d 766 (1996); *Fischer v. Knuck*, 497 So. 2d 240 (Fla. 1986); *Rogers v. State*, 630 So. 2d 513 (Fla. 1994); *Dragovich v. State*, 492 So. 2d 350 (Fla. 1986).

The tobacco companies filed an untimely motion for disqualification, relying on Internet news reports published several years prior to the disqualification motion, that question whether Judge Kaye had ever smoked cigarettes. The motion to disqualify was clearly untimely under Florida law. Fla. R. Jud. Admin. 2.160(e); *Rivera v. State*, 717 So. 2d 477, 481 (Fla. 1998); *Guzman & Co. v. British Realty & Mortgage Corp.*, 699 So. 2d 842 (Fla. 3d DCA 1997), *rev. denied*, 709 So. 2d 543 (Fla. 1999). The motion to disqualify was speculative, legally insufficient and without any factual basis in the record. Had Judge Kaye declared the obvious -- that he is not a class member and has no financial interest in the case, Judge Kaye would have been automatically disqualified under Florida law

STANLEY M. ROSENBLATT, P.A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

since he would be improperly passing on the truth of the allegations.[1]

The motion to disqualify was denied by the trial court and pursuant to Florida law, the trial judge did not state and could not state that he had no financial interest in the case and was not a class member. The tobacco companies filed a petition for writ of prohibition in the Third District Court of Appeal. The petition was considered by the appellate court and denied. The petitions for rehearing were denied. [2] The *amicus* brief is premised on complete misstatements of the record before the Florida state courts. The Engle class action is presently in trial. Judge Kaye has presided over tobacco litigation since 1991.[3]

The *amicus* brief is also objectionable in that it fails to advise this Court that even at the present time, the trial judge has his hands tied and cannot state on the record that he has no interest in the case; that he is not a class member and has never been a class member. The Petitioner tobacco companies have filed repeated motions to disqualify Judge Kaye under Section 38.10, Florida Statutes and Fla. R. Jud. Admin. 2.160, including motions that are currently pending, in individual tobacco cases that have been filed for injuries sustained from exposure to second hand smoke. The motions to disqualify

---

[1]That is precisely why the tobacco companies filed the motion to disqualify -- to place Judge Kaye in this "Catch-22" dilemma.

[2]The tobacco companies filed a motion to supplement the record, submitting a copy of an Associated Press article where a media consultant for the Dade County Courts had purportedly stated to a reporter that Judge Kaye had quit smoking cigarettes over forty years earlier and that the trial judge was not a class member. This report, if accurate, further negates the tobacco companies' claims of class membership.

[3]*Amicus* and the tobacco companies argue that there have been a series of favorable rulings for the Class, reflecting bias on the part of the trial judge. To the contrary, at the inception of the tobacco litigation, in 1992, Judge Kaye dismissed with prejudice all class action allegations and was subsequently reversed by the Third District Court of Appeal in *Broin v. Philip Morris Companies, et al.*, 641 So. 2d 888 (Fla. 3rd DCA 1994), *rev. denied*, 654 So.2d 919 (Fla. 1995). The record will reflect that the Class has received a large number of unfavorable rulings from the trial court throughout this litigation. Whenever the tobacco industry has been aggrieved, it has been afforded full appellate review.

STANLEY M. ROSENBLATT, P.A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-6131

in those individual tobacco cases are similarly frivolous and were probably filed to further hamstring the trial court and to enable the *amicus* and its member tobacco companies to argue before this Court that Judge Kaye has never officially denied the tobacco industry's allegations. Under Florida law, any such denial would equate with the trial judge's automatic disqualification in the Cause.

The Class suggests that under these unique facts this Court should consider the reasoning and holding of Chief Judge Posner in *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063-64 (7th Cir. 1997):

> The tendency of many Judges of this Court, including myself, has been to grant motions for leave to file *amicus curiae* briefs without careful consideration of "the reasons why a brief of an *amicus curiae* is desirable," although the rule makes this a required part of the motion. After 16 years of reading *amicus curiae* briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed fashion.
>
> The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such *amicus* briefs should not be allowed. They are an abuse. The term "*amicus curiae*" means friend of the court, not friend of a party. . . .
>
> . . . . The *amicus* brief does not tell us anything we do not already know. It adds nothing to the already amply proportioned brief of the petitioner.
>
> The bane of lawyers is prolixity and duplication, and for obvious reasons is especially marked in commercial cases with large monetary stakes. In an era of heavy judicial case loads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to *amicus curiae* briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.

The Chamber of Commerce is the antithesis of "objective dispassionate and neutral", as required by the Court in *United States v. Gotti*, 755 F. Supp. 1157, 1159

STANLEY M. ROSENBLATT, P.A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

(E.D.N.Y. 1991):

> Rather than seeking to come as a "friend of the court' and provide the court with an objective, dispassionate, neutral discussion of the issues, it is apparent that the NY-CLU has come as an advocate for one side, having only the facts of one side at the time. In doing so, it does the court, itself and fundamental notions of fairness a disservice. Chief Judge Aldrich cautioned in *Strasser v. Doorley*, [432 F.2d 567 (3d Cir. 1970], that it "may be thought partially questionable" for the Court to accept an *amicus* when it appears that the parties are well represented and that their counsel do not need supplemental assistance and where the joint consent of the parties to the submission by the *amicus* is lacking.

Here, the *amicus* is erroneously presenting as undisputed "facts", allegations of the tobacco companies that cannot be challenged by the trial Judge under Florida law governing recusal motions. As this Court noted in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) "We examine an *amicus curiae* brief solely for whatever aid it provides us in analyzing the legal questions before us." Here, however, there are no legal issues presented but rather the threshold issue as to whether this Court has jurisdiction to review an interlocutory order in a state court action that is currently in trial. See *Jefferson v. City of Tarrant, Ala.*, 118 S. Ct. 481 (1997). There also exists a fundamental factual dispute as to what the record reflects, below, as to the disqualification proceedings before the trial and appellate courts.

As the First Circuit recognized in *New England Patriots Football Club v. University of Colorado*, 592 F. 2d 1196, 1198 n.3 (1st Cir. 1979), an *amicus* brief should never give "a highly partisan account of the facts" but rather, assist the court on matters of law. The *amicus* should provide "impartial information on matters of law about which there was doubt;" the *amicus* should be "an *impartial* friend of the court - *not an adversary party in interest in the litigation*." *United States v. State of Michigan*, 940 F.2d 143, 164-65

STANLEY M. ROSENBLATT, P.A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

(6th Cir. 1991), *cert. denied*, 130 L. Ed. 2d 275 (199_). "An *amicus* who argues facts should rarely be welcomed." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970).

The following are a sampling of examples of partisan and unfounded statements from the proposed *amicus* brief that warrant this Court's denial of the Chamber's motion for leave to file brief *amicus curiae*:

> The question presented in the Petition is whether a trial court judge with a direct personal stake in the outcome of this litigation may continue to serve as the presiding judge in a multi-billion dollar class action lawsuit when he is a former smoker, he suffers from illnesses of the type respondents claim were caused by petitioners and his membership in respondent's Class is undisputed.[4]
>
> * * * *
>
> . . . The judge's failure to recuse himself -- effectively sanctioned by the Florida Appellate Courts given their refusal to grant review -- conflicts with the settled law of this court. . . .[5]
>
> * * * *
>
> The Chamber's brief, moreover, details the risk of potential linkage between the judge's personal circumstances and his legal rulings.
>
> * * * *
>
> . . . . However, it [Chamber] has never before participated in a case such as this where, in blatant violation of elemental due process, the judge making decisions regarding a class of possibly over three quarters of a million people

---

[4]The trial judge has no interest in the outcome of the class action litigation but under Florida Law cannot refute allegations contained in a motion to disqualify. This factual scenario hardly equates with class membership being "undisputed." As an analogy, where an individual is arrested and refuses to speak to the police until he has conferred with counsel, could the State assert that by Defendant's not challenging the accusations and his arrest, these allegations are "undisputed." Here, the argument and facts are much stronger because trial judges are prohibited from disputing the truth of factual allegations in a motion to disqualify and the issue is that of legal sufficiency. A motion based on equivocal news articles dated several years earlier that came to light only after an unfavorable verdict for the tobacco industry was properly found to be legally insufficient by the circuit and appellate courts of Florida.

[5]The Third District Court of Appeal, contrary to the *amicus* assertion, did review the petition for writ of prohibition on the merits and denied same.

STANLEY M. ROSENBLATT, P.A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

> and seeking compensatory and punitive damages of more than $200 billion is himself a member of the respondents' class who stands to profit from his own rulings. . . .

Amicus Brief at 2.

> . . . Neither Judge Kaye, respondents, nor the Florida courts have disputed Judge Kaye's illnesses, his status as a former smoker or his membership in the class.

Id. at 3.

> . . . [H]e [Judge Kaye] (like other class members) stands to benefit significantly from the litigation if the pending multi-billion dollar lawsuit succeeds. . . .And Judge Kaye's individual stakes has the potential to be quite substantial. Under respondents' own estimates, each class member would receive an award of $209,000 per person - a per person award figure that would be substantially increased if, as is likely, the class size and the number of successful litigants is reduced.[6]

Id. at 4.

> Indeed, throughout this litigation, Judge Kaye has made a series of decisions that, at a minimum, create the perception of bias, undermining the overarching requirement that decision makers be neutral in both fact and in appearance. Perhaps Judge Kaye's most troublesome decision is the unprecedented bifurcated trial process he has established. . . .[7]

Id. at 7.

> . . . Such a result. . . would create an enormous windfall for the successful class members "who may include Judge Kaye himself". . . .

Id. at 9.

It was not until after a jury verdict favorable to the Class on July 7, 1999 and after the tobacco companies' post trial motions were denied, that these Petitioners sought

---

[6]The Chamber, as well as Petitioners, toss around large monetary awards where neither compensatory nor punitive damages has been determined by this jury.

[7]The *amicus*, as did the Petitioner tobacco companies, presents a one-sided description of selected rulings that were adverse to the tobacco companies. Because of those rulings, the motion to disqualify was filed, as well as the petition for writ of certiorari.

STANLEY M. ROSENBLATT, P. A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

to disqualify the Court suggesting that perhaps in the trial judge's distant past he might have once been a smoker. There has been an improper pyramiding of inferences and assumptions by the *amicus* that are contradicted by the record and present a distorted and partisan picture of the substantive and procedural proceedings below. Were the Chamber's premise accurate, a substantial percentage of the Judiciary in the United States, and probably most male judges over age fifty, would be "disqualified" to preside over tobacco litigation as former or current smokers.[8]

Federal trial judges have repeatedly denied motions for leave to participate *amicus curiae* where, as here, the motion is filed by an ally of the litigants and is duplicative of the arguments presented. *See United Stationers, Inc. v. United States*, 982 F. Supp. 1279, 1288 n.7 (N.D. Ill. 1997), *aff'd*, 163 F. 3d 440 (7th Cir. 1999); *United States v. Ahmed*, 788 F. Supp. 196, 198 (S.D.N.Y. 1992), *aff'd*, 980 F.2d 161 (2d Cir. 1992); *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir. 1986), ("Where a petitioner's attitude toward litigation is patently partisan, he should not be allowed to appear as *amicus curiae*"); *Liberty Lincoln Mercury v. Ford Marketing*, 149 F.R.D. 65, 82-83 (D.N.J. 1993); *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D.Ill. 1982); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D.Nev. 1999).

The proposed *amicus* brief is a clone of the petition for writ of certiorari and

---

[8]Statistically, over eighty percent of males in the trial judge's age group (approximately 69 to 70 years old) were cigarette smokers at one point in their lives. See David Burns, et al., *Cigarette Smoking Behavior in the United States*, in *Changes in Cigarette Related Disease Risks and Their Implications for Prevention and Control, Smoking and Tobacco Control, Monograph No. 8*, (National Cancer Institute, David Burns, et al., ed., 1997). According to the *amicus*, any judge who is a former smoker should be subject to disqualification. The tobacco companies would make that determination based upon whether the industry receives unfavorable rulings. The *amicus* brief clearly advocates judge shopping. *United States v. El-Gabrowny*, 844 F. Supp. 955, 958-59 (S.D.N.Y. 1994) ("Litigants are entitled to an unbiased judge, not to a judge of their choosing. . . Recusal motions should not be allowed to be used as strategic devices to judge shop.").

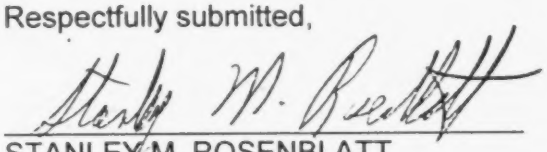
STANLEY M. ROSENBLATT, P.A.
CONCORD BUILDING 12TH FLOOR, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

brings nothing new before this Court other than a replay of Petitioners' impassioned arguments. The *amicus* brief does not serve any of the purposes set forth in *Rule 37* and should be denied. Motions for leave to file an *amicus* brief are "not favored" where opposed by one of the parties. Sup. Ct. R. 37.2(b).

CONCLUSION

Respondents, the Engle Florida Class, most respectfully request that this Court deny the motion for leave to file a brief *amicus curiae* for the reasons stated above.

Respectfully submitted,



STANLEY M. ROSENBLATT
(Counsel of Record)

SUSAN ROSENBLATT
STANLEY M. ROSENBLATT, P.A.
66 West Flagler Street
12th Floor, Concord Building
Miami, Florida 33130
(305) 374-6131

Counsel for Respondents
Florida Engle Class

APPENDICES

RECYCLED PAPER

1

Supreme Court of Florida

WEDNESDAY, DECEMBER 8. 1999

R. J. REYNOLDS TOBACCO COMPANY, et al.,	*	
Petitioners,	*	
vs.	*	CASE NO. 96,862
HOWARD A. ENGLE, M.D., et al.,	*	
Respondents.	*	

The Motion for Leave to File Brief of Amicus Curiae in Support of Petitioners filed by The Chamber of Commerce of the United States is hereby denied.

DY

cc: Hon. David L. Levy, Judge
Hon. Melvia B. Green, Judge
Hon. Mario P. Goderich, Judge
Hon. Robert P. Kaye, Judge
Mr. Dan K. Webb
Mr. Michael Russ
Mr. Thomas M. Sherouse
Mr. Stanley M. Rosenblatt
Ms. Susan Rosenblatt
Mr. Norman A. Coli
Mr. Robert C. Heim
Mr. Stephen N. Zack
Mr. Murray Garnick
Mr. David Eggret
Mr. Melvin Spaeth

Mr. James T. Newsom
Mr. Joseph P. Moodhe
Mr. Michael Fay
Mr. Richard T. Woulfe
Mr. Jose E. Martinez
Mr. James A. Goold
Mr. Mark Hicks
Mr. Richard A. Schneider
Mr. Edward A. Moss
Mr. R. Benjamine Reid
Mr. David L. Ross
Mr. Richard M. Kirby
Ms. Kelly A. Luther
Mr. F. Townsend Hawkes
Mr. Douglas J. Chumbley
Mr. Arthur J. England, Jr.
Mr. Anthony N. Upshaw
Mr. Gordon Smith
Mr. Aaron H. Marks
Mr. Daniel R. Benson
Mr. David H. Lichter
Ms. Mercer K. Clarke
Mr. Gary R. Long
Mr. Walter L. Cofer
Ms. Martha S. Warren

A True Copy

TEST:

Debbie Causseaux

Debbie Causseaux
Acting Clerk, Supreme Court

RECYCLED PAPER

New York Times

FRIDAY, MAY 22, 1998

Printed in Fort Lauderdale

Nationa

Florida: Sunshine temperatures. Hi mid-90's, upper 8 Tonight, warm, l tomorrow. Weath

A commercial from the Chamber of Commerce that casts tobacco legislation as an attack on working people.

Industry Ad Campaign Helps Stall Tobacco Bill

By MELINDA HENNEBERGER

WASHINGTON, May 21 — The tobacco lobby has pulled off a surprising public relations coup, and won a round on Capitol Hill today, thanks in part to the televised image of a harried, sweaty waitress with earrings the size of onion rings who leans into the camera and sighs: "I'm no millionaire. I work hard. Why single me out?"

That commercial, sponsored by the United States Chamber of Commerce, is part of a major advertising and lobbying campaign that has been remarkably successful in turning what tobacco opponents view as a bill that would discourage teen-age smoking into a tax issue and an assault on working stiffs who cannot afford to pay more for cigarettes.

The campaign, by the tobacco industry and its allies, includes the purchase of television time in at least 50 major media markets, and lobbyists on both sides say it was a big factor in the decision today to postpone a Senate vote on the bill until after Congress returns next month from recess. Both sides describe the delay as at least a short-term gain for the tobacco industry.

Scott Williams, a spokesman for the industry, called the postponement "a victory for reality." And Linda Crawford of the American Cancer Society said:

"We've got a stalled bill. If they had really wanted to protect kids and not the tobacco industry, we'd have had a vote today. Their ads have been effective."

One series of television commer-

Continued on Page A21

JEWISH WOMEN/GIRLS LIGHT SHABBAT candles today 18 min. before sunset. In N.Y.C. 7:55 P.M. Info 718-774-2060. Outside N.Y.C. 718-774-3000. In merit of Reizel Gutnick, OBM — ADVT.

Effective Ad Campaign by the Cigarette Industry Helps to Stall the Senate Tobacco Bill

Continued From Page A1

cials sponsored by the tobacco companies uses "man on the street" interviews, of one sentence or less, with real working people who oppose the bill. Another, featuring an exploding cuckoo clock, says: "Washington has gone cuckoo again. Washington wants to raise the price of cigarettes so high there'll be a black market in cigarettes with an unregulated access to kids." The industry's print advertisements say: "Big taxes, big government. There they go again."

One thing the advertisements do not even try to do is buff up the industry's image. "You don't have to like the tobacco industry to have real concerns about where Washington is headed," a print ad says.

The American Cancer Society is running a relatively modest counter-campaign, with a television commercial featuring Dr. C. Everett Koop, former Surgeon General. Shown with the Capitol over his shoulder, Dr. Koop says: "When you see the advertising from the tobacco industry, consider the source. These people are experts at manipulation, and have been lying to the American people for decades."

In addition, the Campaign for Tobacco-Free Kids is running print advertisements in local papers across the country. One in Kansas, for example, says: "Senators Brownback and Roberts: Big Tobacco or Kids? It's time for them to choose. Tobacco vs. Kids. Where America draws the line."

Ms. Crawford, of the American Cancer Society, described the tobacco lobby's current campaign as quite sophisticated. She said the industry had hired a lobbyist for each of the senators, "someone who knows them and how to push their buttons." Mr. Williams, the industry spokesman, denied that but then added, "I would assume the other side has a person assigned to every member as well."

According to the Campaign Study Group's analysis of lobby disclosure records, the tobacco industry has spent about $67 million on lobbying since January 1996. Tobacco opponents say this industry ad campaign alone has cost between $30 million and $50 million. Mr. Williams disputes the larger figure as "way high," without saying how much has been spent.

The bill before the Senate would raise the price of cigarettes by $1.10 a pack over the next five years, give the Government greater regulatory authority over tobacco and require companies to pay penalties if youth smoking did not fall to specified levels.

Some of the most barbed advertising against the legislation has been aimed at its chief architect, Senator John McCain, Republican of Arizona, and is paid for by the National Smokers Alliance, a group that receives financing from the Philip Morris Companies, the Brown & Williamson Tobacco Corporation and the Lorillard Tobacco Company.

Mr. McCain is believed to harbor Presidential ambitions, and among the places where this group's radio advertisements have been broadcast are New Hampshire and Iowa, the states with the early Presidential contests.

In response, the Campaign for Tobacco-Free Kids has sponsored print advertisements praising Mr. McCain.

William D. Novelli, the president of the Campaign for Tobacco-Free Kids, said of the industry: "I don't think they'll lose their pariah status, but they have a couple of points they're scoring with — the tax-and-spend message and the black-market message. They're giving people in Congress cover."

Mr. Novelli and others said tobacco legislation was still likely to pass at some point.

If so, it will not be with the help of the United States Chamber of Commerce, which sees a dangerous precedent in the Government's singling out an industry from which to demand enormous fees.

Bruce Josten of the chamber said delay had been the immediate goal of those who oppose the legislation.

"Debate should continue," Mr. Josten said.

Besides advertising, the tobacco companies have financed so-called grass-roots lobbying activities, urging smokers to call or write their senators. Those smokers who are reached by phone banks sponsored by cigarette makers, or who call the 800 number shown in television ads, are patched through to the senator of their choice. Mr. Williams, the tobacco industry spokesman, said about 130,000 people had called the toll-free number in the last two weeks.

One caller to Senator Tom Harkin, Democrat of Iowa, said the commercial she saw had really hit home.

"They're trying to hurt the little guy, and that's me," that caller, 50-year-old Sandra Scholes of Des Moines, said in an interview. "I'm a baby sitter, and believe me, if I didn't have cigarettes I wouldn't have any hair."

Mrs. Scholes said she earned $75 a week and would be hit hard by higher prices for what she calls her only vice. But having smoked since the age of 16, she said, she does not intend to quit, regardless of the price and despite a heart attack four years ago.

Senator Harkin said his office had also received about 2,500 pre-stamped postcards and 125 petitions in a drive waged by Brown & Williamson. He complained that the petitions, which had been sent to retailers, signed by customers in convenience stores around the country and then mailed to Washington at the expense of the tobacco companies, gave those who signed them the false impression that the mailings were financed by members of Congress: on the back, the petitions said the postage was paid by the addressee.

"This campaign," Mr. Harkin said, "is the most devious I've seen in my 23 years here."

Brennan Dawson, a spokeswoman for Brown & Williamson, described the Senator's complaints as "quite silly."

During the Congressional recess, both sides say, they will continue their lobbying efforts, which, to be sure, were still in full swing today: Ms. Crawford, of the American Cancer Society, said she was on her way back to Capitol Hill for a vote on an amendment that was sure to go against her side. She said of the senators, "I want them to have to feel guilty when they look at me."

RECYCLED PAPER

U.S. Chamber of Commerce
1615 H St., NW
Washington, DC 20062-2000
Media Relations Department (202) 463-5682

NEWS

3

FOR IMMEDIATE RELEASE
Wednesday, June 17, 1998

Contacts: (202) 463-5682 Frank Coleman/ Joe Davis
1-888-BIZ-NEWS (press@uschamber.com)

U.S. CHAMBER DECLARES VICTORY ON TOBACCO BILL

Ads, Lobbying Effort Kills Trial Lawyer Tax Increase

WASHINGTON, D.C. –U.S. Chamber of Commerce President and CEO Thomas J. Donohue declared victory tonight in effectively derailing the Senate tobacco bill.

"Under the guise of stopping teen smoking, this bill became a smokescreen for a huge tax increase, more big government, and a giant bonanza to benefit a handful of wealthy trial lawyers," said Donohue. "Once the public recognized this, it was only a matter of time before it collapsed of its own weight."

The Chamber, which led the business effort to kill the bill by running television advertisements and an all-out lobbying campaign, thanked Senators who stood-up for business and helped block the bill.

"Clearly, tobacco was just the first industry to face this extraordinary assault," he noted. "But, thankfully, we were able to get the message out to Senators, to our members and to the public."

-END-

98-118

Press Releases **Chamber Home Page**

U.S. Chamber of Commerce
1615 H St., NW
Washington, DC 20062-2000
Media Relations Department (202) 463-5682

NEWS

FOR IMMEDIATE RELEASE
Monday, May 18, 1998

Contacts: (202) 463-5682 Frank Coleman/ Joe Davis
1-888-BIZ-NEWS (press@uschamber.com)

TOBACCO BILL: WHO'S NEXT?

U.S. Chamber Launches Ad Blitz

WASHINGTON -- The U.S. Chamber of Commerce announced today that it will begin airing a television ad criticizing the U.S. Senate's tobacco legislation for a massive increase in excise taxes on a single industry and a multi-billion dollar payoff to a handful of trial lawyers.

"Who's next?," said Bruce Josten, Chamber executive vice president, "Raising taxes on 45 million working Americans and small businesses to pay billions to trial lawyers is outrageous."

The Chamber's TV ad (script attached) will begin running on Monday, May 18th.

"This 'tax attack' will not stop with tobacco," said Josten, "Washington will become addicted to this spending and target other industries to fund big government projects. That's why this tobacco tax must be stopped."

He noted that the Senate's tobacco bill would transfer billions of dollars generated on taxes on tobacco sales and businesses to the pockets of a select group of plaintiffs' lawyers.

"Not only does this bill increase taxes on hard working Americans, it also creates 17 federal agencies and represents the largest transfer of wealth to a select group of plaintiffs' lawyers in the history of America," Josten added.

"Business wants to address the serious problem of teen smoking. However, we will not support legislation that uses this issue as a smokescreen to increase taxes on the American people and business," Josten said, noting that current state laws that prohibit the sale of tobacco to minors should be vigorously enforced.

Josten noted a Congressional report that shows 53 percent of tobacco revenues comes from taxes that disproportionately impact people earning less than $30,000.

-END-

98-91

The Tobacco Bill – Another Washington Smoke Screen

By Thomas J. Donohue, President & CEO
U.S. Chamber of Commerce

WASHINGTON – "A custome lothsome to the eye, hatefull to the Nose, harmefull to the braine, dangerous to the Lungs..." said King James I in 1603 of the newly discovered practice of smoking tobacco. Nearly four hundred years later, the question is no longer whether tobacco is bad for your health – there's no question about that! – but how the public should deal with this issue.

Currently, the Senate is debating a bill which would impose drastic regulations on tobacco products – and impose on a legal industry enormous unprecedented fines, marketing restrictions, and requirements that it fund government health programs and services. Originally set out as a compromise deal between the tobacco companies and the 40 states suing them over health care costs, the bill's purported goal is to reduce teen smoking. But like so many other proposals in Washington, there's much more to this bill than meets the eye.

- *The proposed legislation would result in a huge tax increase that would transfer wealth from the cigarette-smoking public to plaintiff's lawyers* . The plan is for a new federal cigarette tax of $1.10, which would nearly double the price of a packet of cigarettes, and fall disproportionately on people earning $30,000/year or less. Added to the billions of dollars in fines and payments to be levied on the tobacco industry, the total pull could approach $800 billion over 25 years. Tens of billions of dollars will likely go to millionaire trial lawyers in the form of fees.

- *It would vastly increase the size and scope of government* . This legislation would require the creation of between 17 and 34 new federal bureaucracies to monitor tobacco use and regulation. Much of the money collected from the $800 billion will go to pet initiatives of the Clinton Administration – plans that have little or nothing to do with teen smoking.

- *This pot of money will soon become addictive to politicians and lead to the same "tax attack" on other industries* . The Administration and some in Congress say that they need to impose a high tax to reduce demand for cigarettes, but they also have grandiose plans for the tax money. If demand actually does drop – which is what the politicians claim is their goal – then one wonders which industry will be next in line to fund pet programs. My prediction: other industries that some deem "politically incorrect" – beer, wine and spirits, fattening food, diesel fuel...the list goes on.

- *The proposal is an open invitation to smugglers* . Certainly people might buy fewer expensive packets of cigarettes, but that doesn't mean they'd decrease their total consumption. International evidence strongly suggests that a black market would quickly develop. For example, in 1993, high-tax Canada saw $2 billion in cigarette smuggling, eventually leading to a tax decrease. Sweden had a similar experience. Smuggling would exacerbate teenage smoking as well, since the black market would be completely unregulated and unconcerned with age provisions.

- *The legislation raises serious constitutional concerns* . For one thing, tax legislation is supposed to originate in the House, not the Senate, which is why so many on Capitol Hill are calling the tobacco tax increase a "price adjustment." But that's not the only odd element.

The legislation also includes a provision that would penalize tobacco companies if teen smoking is not reduced by a specified amount during a

specified period of time for any reason. The companies would be forced to pay a fine and would be open to class-action lawsuits. This is an unusual and legally questionable provision that seems designed to fail (so that it would be even easier to sue tobacco companies in the future).

Finally, the advertising provisions would ban animal characters and require ads to be text in black and white, among other things. But soon after similar restrictions were proposed by the FDA in 1995, a federal circuit court judge in North Carolina ruled that they were unconstitutional. Even a current Federal Trade Commission commissioner wrote last year that there was not a scientific basis for these restrictions.

A targeted educational program to cut teen smoking would be a legitimate and important undertaking. But the proposed tobacco bill is not really about reducing teen smoking. It is a smokescreen that masks a huge consumer tax increase, more government bureaucracy, and the transfer of billions of dollars to a small group of plaintiff's lawyers so they can fund more lawsuits and political activities. All Americans – smokers and non-smokers alike – should oppose this bill.

U.S. Chamber of Commerce | 800-649-9719

Please report broken links to the Webmaster.

U.S. Chamber of Commerce
1615 H St., NW
Washington, DC 20062-2000
Media Relations Department (202) 463-5682

NEWS

FOR IMMEDIATE RELEASE
Tuesday, May 19, 1998

Contacts: (202) 463-5682 Frank Coleman/ Joe Davis
1-888-BIZ-NEWS (press@uschamber.com)

CHAMBER SAYS TOBACCO DEAL AWARDS PLAINTIFF'S LAWYERS - HURTS HARD WORKING AMERICANS

WASHINGTON -- The U.S. Chamber of Commerce said today at a Capitol Hill press conference with U.S. Senators that it remains opposed to a tobacco legislation that broadens the scope of the government and increases taxes on Americans to fund a multi-billion dollar payoff to plaintiff's lawyers.

Lonnie P. Taylor, Chamber senior vice president, said, "Raising taxes on 45 million working Americans and small businesses to pay billions to trial lawyers and expand the federal government is unacceptable and outrageous."

He noted that the Senate's tobacco bill could result in the transfer of billions of dollars generated by taxes on tobacco sales and businesses to the pockets of a select group of plaintiffs' lawyers.

"This industry specific 'tax attack' will not stop with tobacco," said Taylor, "Washington will become addicted to this spending and plaintiff's lawyers will use their new found billions to finance attacks on other industries that may fall out of political favor. This tobacco tax must be stopped."

Taylor added, "Business wants to address the serious issue of teen smoking, and we believe current laws, in all 50 states, should be vigorously enforced. However, we will not support legislation that uses this issue as a smoke screen to increase taxes on business and working Americans."

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

-END-

98-92

Press Releases **Chamber Home Page**

U.S. Chamber of Commerce
1615 H St., NW
Washington, DC 20062-2000
Media Relations Department (202) 463-5682

NEWS

FOR IMMEDIATE RELEASE
Friday, June 12, 1998

Contacts: (202) 463-5682 Frank Coleman/ Joe Davis
1-888-BIZ-NEWS (press@uschamber.com)

U.S. CHAMBER PRESIDENT BLASTS TOBACCO BILL IN LETTER TO SENATE

"No Amendments To This Bill Would Make It Acceptable"

WASHINGTON, D.C. –U.S. Chamber of Commerce President and CEO Thomas J. Donohue, in a letter to all Senators, called the tobacco bill unredeemable and urged them to kill it by voting against any cloture motion to end debate.

He said the bill was no longer about teen smoking and instead had become "a huge smokescreen" covering hundreds of billions of dollars in tax increases, more big government and a huge bonanza for a small group of wealthy plaintiff attorneys.

Donohue said, "We wish to make it very clear that no amendments to this bill would make it acceptable to the U.S. Chamber and the millions of businesses we represent."

The letter also states that the Chamber intends to score tobacco bill votes in rankings of Senators. Donohue also said the Chamber would continue airing its powerful TV advertisement against the legislation next week.

-END-

98-113

Press Releases **Chamber Home Page**

U.S. Chamber of Commerce
1615 H St., NW
Washington, DC 20062-2000
Media Relations Department
(202) 463-5682

NEWS

FOR IMMEDIATE RELEASE
Wednesday, September 22, 1999

Contacts: Frank Coleman/Linda Rozett
(202) 463-5682/888-249-NEWS

United States Chamber of Commerce Condemns Justice Department Tobacco Lawsuit

WASHINGTON, DC -- The United States Chamber of Commerce today condemned the Department of Justice for filing a massive lawsuit against the tobacco industry, saying it represents an unlawful tax increase and an assault on all businesses, shareholders and consumers.

"No business can feel secure in the United States when the enormous power of the Justice Department can be unleashed against them for the purpose of raising revenue and scoring political points," Chamber Executive Vice President Bruce Josten said. "This is nothing more than taxation through litigation.

"We believe this is a government sponsored assault on the shareholders of legal industries and consumers of legal products," he added. "This is a very dangerous precedent threatening all legal but politically unpopular businesses. What we're asking is: Who's next?"

Josten noted that President Clinton is making good on his pledge in the State of the Union address to use the Department of Justice to sue the tobacco industry in order to fund government programs.

"In the Clinton Administration politics has clearly taken precedence over the rule of law," Josten warned. "it is stunning the hypocrisy of government suing for veterans' health costs when it gave billions of free cigarettes to soldiers."

Last year, the Chamber helped persuade Congress to reject a massive tax on tobacco as unwise and unnecessary.

The Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

END

99-163

top | News Main Page | U.S. Chamber Home

Related Links

U.S. Chamber Blasts Billion Dollar Trial Lawyer Payoff in State Tobacco Settlement

U.S. Chamber Declares Victory on Tobacco Bill

Voice of Business - The Tobacco Bill - Another Washington Smoke Screen

---

National Chamber Litigation Center